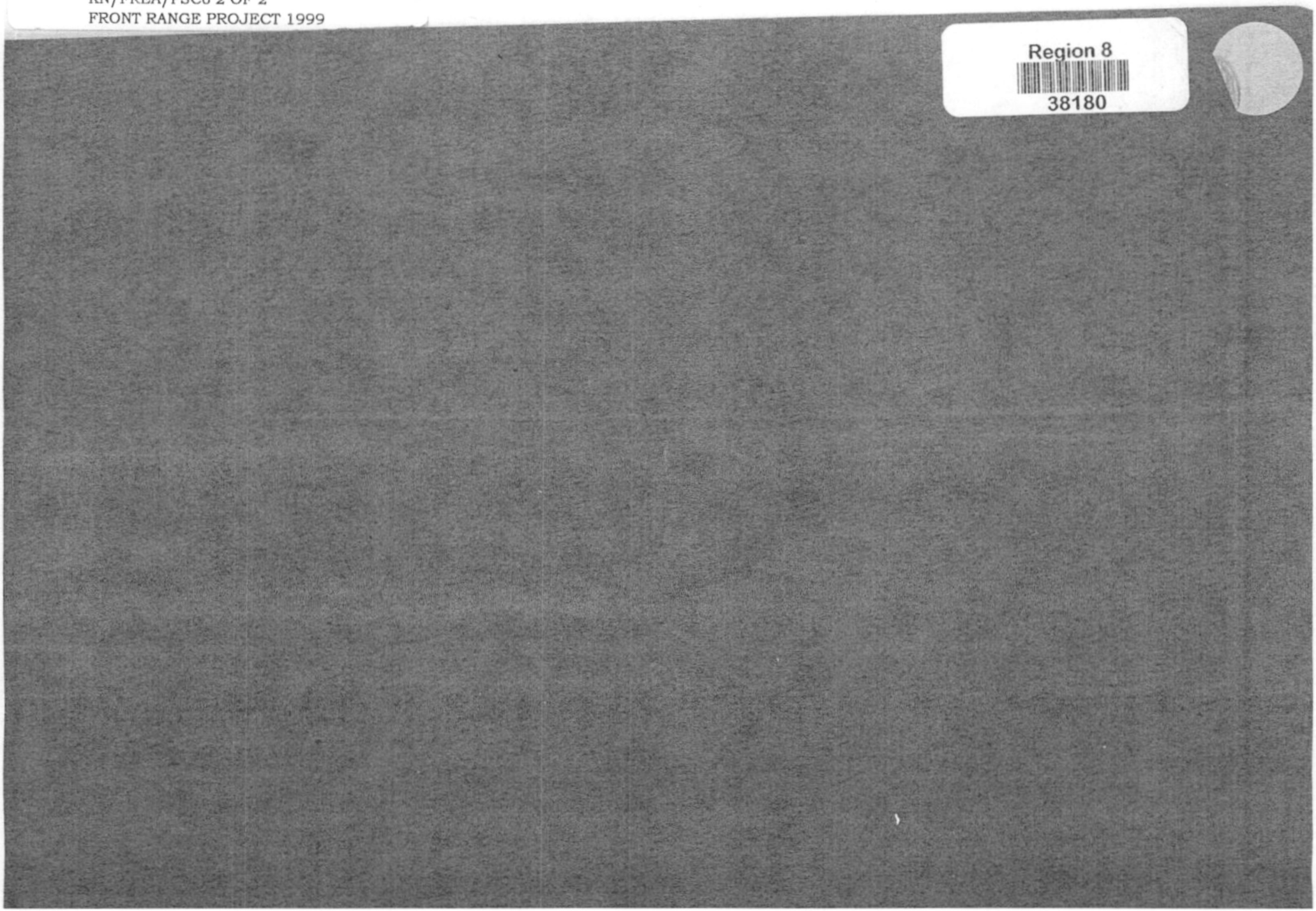

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PUBLIC SERVICE COMPANY OF COLORADO, Petitioner, vs. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	Case No. 99-9542

CERTIFIED ADMINISTRATIVE RECORD ON PETITION FOR REVIEW

Volume 3 of 3

Dated: March 24, 2000

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources Division

DANIEL W. PINKSTON
Senior Trial Attorney
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
999-18th Street, North Tower # 945
Denver, Colorado 80202

OF COUNSEL.

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U.S. Environmental Protection Agency
Region VIII
999-18th Street, Suite 500
Denver, Colorado 80202-2466

M. LEA ANDERSON
Office of General Counsel
U.S. Environmental Protection Agency
Mail Code 2344A
401 M Street, S.W.
Washington, D.C. 20460

INDEX TO ADMINISTRATIVE RECORD

NO.	DATE OF DOCUMENT	DESCRIPTION OF DOCUMENT	
1	3/16/1979	Memo from Edward E. Reich, Director, Division of Stationary Source Enforcement, EPA, to Diana Dutton, Director, Enforcement Division, Region VI	3
2	3/22/1990	Letter from Douglas M. Skie, Chief, Air Programs Branch, EPA Region VIII, to Jeffrey T. Chaffee, Chief, Air Quality Bureau, Montana Department of Health and Environmental Sciences	3
3	10/1990	New Source Review Workshop Manual, USEPA, Office of Air Quality Planning and Standards, DRAFT, October 1990 (cover page provided - document available at http://www.epa.gov/ttn/nsr/gen/wkshpman.pdf)	1
4	8/22/1991	Letter from Douglas M. Skie, Chief, Air Programs Branch, EPA Region VIII, to Cathy Rhodes, Air Pollution Control Division (State of Colorado)	2
5	7/20/1995	Letter from Jewell A. Harper, Chief, Air Enforcement Branch, Air, Pesticides, and Toxics Management Division, EPA Region 4, to Mr. Ron Methier, chief, Air Protection Branch, Environmental Protection Division, Georgia Department of Natural Resources	2
6	9/18/1995	Letter from William A. Spratlin, Director, Air, RCRA, and Toxics Division (signed for Mr. Spratlin by Karen A. Flournoy), to Peter R. Hamlin, Chief, Air Quality Bureau, Iowa Department of Natural Resources	5
7	11/2/1995	Letter from Jewell A. Harper, Chief, Air Enforcement Branch, Air, Pesticides, and Toxics Management Division, EPA Region 4, to Mr. Terry C. Harris, P.E., Knox County Department of Air Pollution Control	1
8	8/2/1996	Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, EPA	26
9	11/27/1996	Letter from Matt Haber, Chief, Permits Office, EPA Region 9, to Jennifer B. Schlosstein, Simpson Paper Company	4

10	3/26/1997	Technical Review Document for Operating Permit 96OPWE154 to be issued to: Public Service Company - Ft. Lupton Combustion Turbines, Weld County, Source ID 1230014, Prepared on October 3, 1996, Revised November 19, 1996, January 16, 1997 and March 26, 1997, Jacqueline Joyce, Review Engineer (CDPHE)	6
11	7/15/1997	Letter from Cheryl L. Newton, Chief, Permits and Grants Section, EPA Region 5, to Robert Hodanbosi, Chief, Division of Air Pollution Control, Ohio Environmental Protection Agency	2
12	10/10/1997	Colorado Department of Public Health and Environment Operating Permit #96OPWE154 (originally issued 5/20/1997, as amended 10/10/1997) for Public Service Company of Colorado - Fort Lupton Combustion Turbines	42
13	11/25/1997	Letter from Steven C. Riva, Chief, Permitting Section, Air Programs Branch, EPA Region 2, to Michael L. Rodburg, Esq., Lowenstein, Sandler, Kohl, Fisher & Boylan	4
14	5/21/1998	Letter from Richard R. Long, Director, Air Program, EPA Region 8, to Lynn Menlove, Manager, New Source Review Section, Utah Division of Air Quality	4
15	10/2/1998	Decision No. C98-1042 Before the Public Utilities Commission of the State of Colorado, Docket No. 97A-297E, in the Matter of the Application of Public Service Company of Colorado for an Order Approving its 1996 Integrated Resource Plan, "Order Approving Setlement Agreement With Modifications," adopted 10/2/1998. (Provided to EPA by KN Energy on 9/22/1999.)	71
16	11/2/1998	Letter from Steven C. Riva, Chief, Air Programs Branch, EPA Region 2, to Janet Griffin, Manager, Environmental Affairs, Schering-Plough Corporation	1
17	11/2/1998	Public Service Company of Colorado Separation Policy. (Provided to EPA by KN Energy on 9/22/1999.)	12
18	11/12/1998	Letter from Richard R. Long, Director, Air Program, EPA Region 8, to Julie Wrend, Legal Administrator, Air Pollution Control Division, CDPHE	3

19	11/25/1998	KN Power - Air Permit Application to Construct a Power Plant Near Fort Lupton, submitted by Air Sciences, Inc., on behalf of KN Power to CDPHE	136
20	1/15/1999	Letter from Kathleen Henry, Chief, Permits and Technical Assessment Branch, EPA Region III, to Mr. John Slade, Chief, Division of Permits, Pennsylvania DEP (version reviewed was from electronic database and is undated; copy of original document is dated 1/15/1999)	5
21	2/22/1999	KN Power Fort Lupton Project - Response to Comments, submitted by Air Sciences, Inc., on behalf of KN Power to CDPHE	31
22	4/30/1999	Note to File written by Meredith Bond, Environmental Engineer, EPA Region 8 - Air Program Technical Unit	1
23	4/30/1999	Power Supply Agreement for the Sale of Electric Capacity and Energy to Public Service Company of Colorado by Front Range Energy Associates, L.L.C. (Provided to EPA by KN Energy on 9/22/1999.)	162
24	4/30/1999	Power Purchase Agreement by and between Front Range Energy Associates, L.L.C., as Seller and e prime, inc. as Purchaser. (Provided to EPA by KN Energy on 9/22/1999.)	78
25	7/8/1999	Letter from Cheryl Sweeten, Public Comment Coordinator, Stationary Sources Program, Air Pollution Control Division, CDPHE to Meredith Bond, Air Programs Branch, U.S. EPA, Region VIII - Public comment packet for KN Power Company synthetic minor permit action	18
26	8/9/1999	Newspaper article: "KN cooking with gas," Steve Raabe, The Denver Post, Monday, August 9, 1999, page E1	3
27	8/17/1999	Letter from Denis Myers, P.E., Construction Permit Unit Leader, CDPHE to Mr. Paul Steinway, Vice President, KN Power, and to Mr. Frank Prager, Associate General Counsel, Public Service Company (Provided to EPA by State on 9/27/1999)	2
28	9/2/1999	Letter from Martha Rudolph, Assistant General Counsel, KN Energy, Inc., to Mr. Dennis Myers Air Pollution Control Division, CDPHE. (Provided to EPA by State on 9/9/1999)	4

29	9/7/1999	Letter from Martha E. Rudolph, Assistant General Counsel, KN Energy, Inc., to Mr. Dennis Myers, Air Pollution Control Division, CDPHE, with Enclosure. (Provided to EPA by State on 9/9/1999)	56
30	9/22/1999	Letter from Martha E. Rudolph, Assistant General Counsel, K N Energy, Inc., to Richard Long, U.S. Environmental Protection Agency, Region VIII (undated - hand delivered to EPA on 9/22/1999)	11
31	9/22/1999	Amended and Restated Limited Liability Company Agreement of Front Range Energy Associates, L.L.C. (Pages dated 9/22/1999; provided to EPA by KN Energy on 9/22/1999)	55
32	9/27/1999	Letter from Martha E. Rudolph, Assistant General Counsel, KN Energy, Inc., to Richard Long, United States Environmental Protection Agency, Region VIII	7
33	9/28/1999	DRAFT letter from Richard Long, Director, Air and Radiation Program, EPA Region 8, to Margie Perkins, Director, Air Pollution Control Division, CDPHE (draft was faxed to State)	2
34	9/28/1999	DRAFT letter from Richard Long, Director, Air and Radiation Program, EPA Region 8, to Martha E. Rudolph, Assistant General Counsel, KN Energy, Inc. (draft was faxed to State)	6
35	10/1/1999	Letter from Richard Long, Director, Air and Radiation Program, EPA Region 8, to Martha E. Rudolph, Assistant General Counsel, KN Energy, Inc. (enclosing document #36)	1
36	10/1/1999	Letter from Richard Long, Director, Air and Radiation Program, EPA Region 8, to Ms. Margie Perkins, Director, Air Pollution Control Division, CDPHE	6
37	10/26/1999	Letter from Frank P. Prager, Associate General Counsel, New Century Energies, Inc., to Mr. Richard Long, U.S. Environmental Protection Agency, Region VIII (with enclosures)	97
38	11/8/1999	Slides presented by PSCo at meeting with EPA	16
39	11/12/1999	Letter from Richard Long, Director, Air and Radiation Program, EPA Region 8, to Frank Prager, Associate General Counsel, New Century Energies	2

40	Undated	Letter from Bernard E. Turlinski, Chief, Air Enforcement Branch, EPA Region III, to Ms. Westy McDermid, DC Advisory Neighborhood Council 2-E01	1

Re: ASP-4r
JUL 12 1999

STATE OF COLORADO

Bill Owens, Governor
Jane E. Norton, Executive Director

Dedicated to protecting and improving the health and environment of the people of Colorado

4300 Cherry Creek Dr. S.
Denver, Colorado 80246-1530
Phone (303) 692-2000
Located in Glendale, Colorado

Laboratory and Radiation Services Division
8100 Lowry Blvd.
Denver CO 80220-6928
(303) 692-3090

http://www.cdphe.state.co.us

Colorado Department
of Public Health
and Environment

July 8, 1999

Ms. Meredith Bond
Air Programs Branch
U.S. EPA, Region VIII
8P2-AR
999 18th St., Suite 500
Denver, Colorado 80202

RE: Public Comment for: KN Power Company

Dear Ms. Bond:

A public comment packet has been prepared for KN Power Company. This public comment was published in The Rocky Mountain News. A copy of this public comment is enclosed.

Permit Number: 98WE0815
Source Type:
[ ] New Major
[ ] PSD
[ ] Non-Attainment
[ ] Major Modification
[ ] Synthetic Minor Modification of a Major Source
[ ] A1 (> 100 Controlled)
[ ] New Minor Source
[ ] Synthetic Minor for Title V Operating Permit
[ ] Landfill Subject to NSPS, WWW
[ ] Major Source
[ ] MACT Source
[x] Synthetic Minor Source for PSD
[ ] Land Development Source
Package Includes:
[x] Public Comment Package with Draft Permits
[ ] Initial Approval Permit
[ ] Final Approval Permit
[ ] Minor Permit Revision-Revised Permit Enclosed

Sincerely,

Cheryl Sweeten

Cheryl Sweeten
Public Comment Coordinator
Stationary Sources Program
Air Pollution Control Div.
Enclosures

NOTICE OF INTENTION TO INSTALL AND OPERATE

AN ELECTRIC POWER GENERATING FACILITY

BY

KN POWER COMPANY

TABLE OF CONTENTS

Prepared by

Ram N. Seetharam
Stationary Sources Program
Air Pollution Control Division
Colorado Department of Public Health and Environment
4300 Cherry Creek Drive South, APCD-SS-B1
Denver, CO 80246-1530

Rec'd 7-12

JUL 12 1999

STATE OF COLORADO

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Colorado Department
of Public Health
and Environment

Released to The Rocky Mountain News Dated July 7, 1999

PUBLIC NOTICE OF A PROPOSED PROJECT

OR ACTIVITY WARRANTING PUBLIC COMMENT

The Colorado Air Pollution Control Division has declared that the following proposed construction activity warrants public comment. Therefore, the Air Pollution Control Division of the Colorado Department of Public Health and Environment, hereby gives NOTICE, pursuant to Section 25-7-114.5(5), C.R.S. 1973, as amended, of the Colorado Air Pollution Prevention and Control Act, that an application to the Division has been received for an emission permit on the following proposed project and activity:

KN Power Company has proposed to construct an electric power generating facility, known as **KN Fort Lupton Power Generating Station**, to be located in the Northeast ¼ of the Northwest ¼ of Section 34, Township 2 North, Range 66 West, 0.5 mile east of the intersection of Weld County Roads 16 and 31, and south of Weld County Road 16, in Weld County, Colorado. The facility will consist of: Four (4) natural gas fired, simple-cycle, combustion turbines, each heat input rated at 344,000,000 BTU per hour, and each powering an electric generator, site output rated at 40 Megawatts; Four (4) evaporative water cooling towers. The facility is a **potential major stationary source**. The company has requested that a federally enforceable permit be issued, and that the potential to emit be limited to below the major stationary source thresholds. With the issuance of such a permit, the facility will be classified as a **synthetic minor stationary source**, and will not be subject to review under major stationary source provisions (Prevention of Significant Deterioration). The facility will be subject to operating permit program under Title V of the Federal Clean Air Act Amendments, 1990. The requested emissions (tons per year) are: Particulate Matter: 89.07; PM-10 (Particulate Matter less than 10 micrometers aerodynamic diameter): 88.13; Oxides of Nitrogen: 247.50; Carbon Monoxide: 247.50; Sulfur Dioxide: 3.52; and Volatile Organic Compounds: 52.60. The applicant has declared that the emissions of non-criteria reportable pollutants are below the notification levels. A testing requirement has been included for such pollutants. Copy of draft permit is available for review in the public comment package.

The Division hereby solicits and requests submission of public comment concerning the aforesaid proposed project and activity for a period of thirty (30) days from and after date of this publication. Any such comment must be in writing and be submitted to the following addressee:

Ram N. Seetharam
Stationary Sources Program
Air Pollution Control Division
Colorado Department of Public Health and Environment
4300 Cherry Creek Drive South, APCD-SS-B1
Denver, CO 80246-1530

(more)

Within thirty (30) days following the said thirty (30)-day period for public comment, the Division shall consider comments and, pursuant to Section 25-7-114(4)(f)(11), either grant, deny, or grant with conditions, the emission permit. Said public comment is solicited to enable consideration of approval of and objections to the proposed construction of the subject project and activity by affected persons.

A copy of the application for the permit, the Preliminary Analysis of said application, and accompanying data concerning the proposed project and activity are available for inspection in the office of the Clerk and Recorder of Weld County, Colorado, during regular business hours of said office, and also may be inspected at the office of the Air Pollution Control Division, Colorado Department of Public Health and Environment, 4300 Cherry Creek Drive South, Building B, 1st Floor, Denver, Colorado.

###

COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT
AIR POLLUTION CONTROL DIVISION

Colorado Department of Public Health and Environment

PRELIMINARY ANALYSIS

Applicant	KN Power Company	Permit No.	98-WE-0815
Plant Location	KN Ft Lupton Electric Power Generating Station NE/4 NW/4 Sec 34 T2N R66W 0.5 mile east of intersection of CR 16 and 31, and south of CR 16, Weld County.	Source No.	1230545001 (4 turbines) 1230545002 (4 cooling towers) 123054599 (facility-wide)
Review Engineer	Ram N. Seetharam	Date	July 1, 1999
Control Engineer	Dennis M. Myers, P.E.	Page	1 of 1

Project Description:	**KN Power Company** has proposed to construct an electric power generating facility, known as **KN Fort Lupton Power Generating Station**, to be located in the Northeast ¼ of the Northwest ¼ of Section 34, Township 2 North, Range 66 West, 0.5 mile east of the intersection of Weld County Roads 16 and 31, and south of Weld County Road 16, in Weld County, Colorado. The facility will consist of: Four (4) natural gas fired, simple-cycle, combustion turbines, each heat input rated at 344,000,000 BTU per hour, and each powering an electric generator, site output rated at 40 Megawatts; Four (4) evaporative water cooling towers. The facility is a **potential major stationary source**. The company has requested that a federally enforceable permit be issued, and that the potential to emit be limited to below the major stationary source thresholds. With the issuance of such a permit, the facility will be classified as a **synthetic minor stationary source**, and will not be subject to review under major stationary source provisions (Prevention of Significant Deterioration). The facility will be subject to operating permit program under Title V of the Federal Clean Air Act Amendments, 1990.
Emissions Sources:	Combustion gases from combustion of natural gas in simple-cycle combustion turbines. Particulate matter from cooling towers due to evaporation of drift water droplets and release of dissolved solids as particulate matter. Testing requirement has been included in the proposed permit.
Requested Emissions:	Facility emissions: Particulate Matter: 89.07 tons per year PM-10 (particulate matter < 10 μm): 88.13 tons per year Oxides of Nitrogen: 247.50 tons per year Carbon Monoxide: 247.50 tons per year Volatile Organic Compounds: 52.60 tons per year Applicant has declared that emissions of all non-criteria reportable / hazardous air pollutants are below the Air Pollutant Emission Notice requirements. A testing requirement has been included in the permit.
Regulatory Status:	1. The facility is a **potential major stationary source**. 2. With the issuance of the proposed permit to limit the potential to emit to below the major stationary source thresholds, the facility is classified as a **synthetic minor stationary source**, and is not subject to the provisions under Prevention of Significant Deterioration. 3. The facility is subject to operating permit program under the Federal Clean Air Act Amendments, 1990. 4. The turbines are subject to Standards of Performance for New Stationary Sources.
Impact on Ambient Air Quality:	At the requested emissions, the National Ambient Air Quality Standards will not be violated.
Public Comment Requirement	To render the permit and permit conditions federally enforceable, and to classify the facility as a **synthetic minor stationary source**.

APPLICATION FOR CONSTRUCTION PERMIT OR PERMIT MODIFICATION
(previously referred to as EMISSION PERMIT)

This application must be filled out completely except for #14 and #15: otherwise, application will be considered incomplete
SEE INSTRUCTIONS ON REVERSE SIDE. Mail completed application, APENs, and filing fee to:

Colorado Department of Public Health and Environment
Air Pollution Control Division
4300 Cherry Creek Drive South, APCD-SS-B1
Denver, Colorado 80246-1530 Telephone: (303)692-3150

RECEIVED
APR 29 1999
Air Pollution Control Division
Stationary Sources Program

1. *Permit to be issued to:* KN Power Company

2. *Mailing Address:* PO Box 188, Fort Lupton
State: CO
Zip Code: 80621

3a. *Agent for Service (See No. 3 on reverse):* N/A

3b. *Federal Tax Identification Number:* 84-146-5528

4a. *General Nature of Business:* Generation of electrical energy for sale.

4b. *SIC Code:* 4911

5a. *Air Pollution Source Description:* Four combustion turbines fueled by natural gas.

5b. *Days per year source will operate:* 365

6a. *Source Location Address (Include Location Map):* Township 2N, Range 66W, Section 34. Northeast of Fort Lupton. One-half mile east of the intersection of County Roads 16 and 31, and south of County Road 16.
(If using Township and Range, give directions and distance from nearest town or intersection.) *County:* Weld

6b. *UTM Coordinates (in km)*
520.118 H 4438.155V

7. **ESTIMATED COSTS:**
7a. *Source, Process Equipment or Project:*
Cap. Cost $70 million

Air Pollution Control Procedures or Equipment
7b. *Capital Cost:* $ 347,000 per combustion turbine.
7c. *Operating Cost:* $ 332,000 per combustion turbine.

8a. **STATUS**

- [x] *New Air Pollution Source*
- [ ] *Modification to Permitted Source (Control Equipment added, process change, etc.):* ___
- [ ] *Transfer of Ownership — Transferred from:* _____
- [ ] *Existing Source- not permitted (Include Date of Source Start-up):* ____
- [x] *Requesting to limit a source's Potential to Emit for criteria or Hazardous Air Pollutants using Regulation No. 3 (for new and existing sources)*
- [ ] *Requesting to limit a source's Potential to Emit for Hazardous Air Pollutants only using Regulation No. 8 (for existing sources only)*
- [x] *Other:* Synthetic Minor for PSD Provisions.

Projected Dates for Construction to:

8b. *Begin:* 6/1/1999 8c. End: 4/1/2000

8d. *Projected Source Startup Date:* 4/15/2000

9. *Enclose check to cover APEN FILING FEES. One APEN should be filed for each emission point*
NOTE: Additional processing fees must also be paid prior to permit issuance.
2 revised APENS @ $100.00 per APEN = $ Fees included with the APENs submitted on November 30, 1998

10. *SIGNATURE OF LEGALLY AUTHORIZED PERSON (NOT Vendor or Equipment Manufacturer)*

11a. *Date Signed:* 4/28/99

11b. Phone: (303) 857-3101
Fax: (303) 857-3116

12. *Type or Print name and official title of person signing item 10.*
Paul R. Steinway, Vice President, KN Power Company

for Agency Use Only
14. DATE RECEIVED

13. **Check appropriate box if you want:**
a. X *Copy of preliminary analysis conducted by Division*
b. X *To review a draft of the permit prior to issuance*
Note: Checking either item could result in increased fees and/or processing time. See Reverse.

123/0545/999

15. PERMIT NUMBER
98-WE-0815

I:\CPUFORMS.98A\CP_APPN.98A

AIR POLLUTANT EMISSION NOTICE

PERMIT No.: 98WE0815 AIRS ID.: 123/0545/001

FIRM NAME KN Power Company

MAIL ADDRESS PO Box 188, Fort Lupton STATE: CO ZIP: 80621

PLANT NAME & LOCATION FREA One-half mile east of the intersection of County Roads 16 and 31, and south of County Road 16 COUNTY Weld

HOME-BASE FOR PORTABLE SOURCES

PERSON TO CONTACT REGARDING THIS INFORMATION Kevin S. Lewis, Air Sciences Inc. TITLE PHONE (303) 988-2960

GENERAL DESCRIPTION OF THIS PLANT'S FUNCTION Generate electricity FEDERAL TAX I.D. NO. 84-146-5528

A. GENERAL INFORMATION		Normal Operation of This Source			Process Seasonal Throughput (% of Annual)				ADDITIONAL INFORMATION OR REMARKS: Combustion Turbine Information in sections A, B, and C represent a single combustion turbine (CT). The information in section B represents the total of all four CT's.
No. of Employees	Land Area	Hours/Day	Days/Week	Weeks/Year	Dec-Feb	Mar-May	Jun-Aug	Sep-Nov	
Two	20 acres	24	7	52	25	25	25	25	

B. STACK OR VENT INFORMATION (Identify below which stack if plant has two or more; refer to attached sketch of plant layout)

Height	Diameter	Temperature	Flow Rate	Velocity	Moisture	Plant ID No. for Stack
45ft	9.5 ft	818°F	573,568 ACFM	8092 ft/min	6 %	Section B represents a single stack. There are four identical stacks, numbered CTA, CTB, CTC & CTD, one for each combustion turbine.

C. FUEL INFORMATION 9.024 KJ/watt-hr 40MW

Description of Combustion Unit	Design Input Rate (10^6 BTU/HR)	Kind of Fuel Burned	Annual Fuel Consumption: Requested level First year level	Annual Fuel Consumption: Data year level	Fuel Heating Value: (BTU/lb, BTU/gal, or BTU/SCF)	Per Cent by Weight: Sulfur (X.XX%)	Per Cent by Weight: Ash (XX.X%)	Seasonal Fuel Use (% of Annual Use): Dec-Feb	Mar-May	Jun-Aug	Sep-Nov	Space Htg (% Ann.)
Combustion Turbine (CT). Four, each	334, at LHV & 50°F	natural gas	3080 mmSCF each turbine		950 Btu/scf (LHV)	0.0007	00.0	25	25	25	25	N/A
Make/Model: General Electric / LM6000												
Serial No. N/A (Not Applicable)												

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APR 29 1999
Pollution Control Division
Stationary Sources Program

D. PROCESS INFORMATION

Description of Processing Unit	Raw Materials Used: Description	Raw Materials-Annual Consumption: Requested level	Raw Materials-Annual Consumption: Data year level	Design Process Rate (Specify Units/Hour)	Finished Product Description	Finished Product-Annual Output: Requested level	Finished Product-Annual Output: Data year level
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Make/Model: N/A							
Serial No.: N/A							

E. POLLUTION CONTROL EQUIPMENT

Pollutant	Type of Control Equipment: Primary	Type of Control Equipment: Secondary	Overall Collection Efficiency	ESTIMATED EMISSIONS (TONS/YEAR) AT THROUGHPUTS REQUESTED ABOVE: CONTROLLED	ESTIMATED EMISSIONS (TONS/YEAR) AT THROUGHPUTS REQUESTED ABOVE: UNCONTROLLED	ACTUAL EMISSIONS (DATA YEAR)	ESTIMATION METHOD
Particulate	None	None	N/A	87.6	87.6		Manufacturer's data
PM_{10}	None	None	N/A	87.6	87.6		Manufacturer's data
So_x	None	None	N/A	3.52	3.52		Manufacturer's data
NO_x	Water injection	None	N/A	247.5	N/A		Manufacturer's data
VOC	None	None	N/A	52.6	52.6		Manufacturer's data
CO	Good Combustion	None	N/A	247.5	247.5		Manufacturer's data

PLEASE USE APCD NON-CRITERIA REPORTABLE AIR POLLUTANT ADDENDUM FORM TO REPORT SUCH POLLUTANTS OR POLLUTANTS NOT LISTED ABOVE.

☐ CHECK HERE IF YOU WISH THE DIVISION TO CALCULATE YOUR EMISSIONS. SEE "EMISSION ESTIMATES" INSTRUCTIONS ON BACK.

CHECK ALL BOXES THAT APPLY

- ■ New or previously unreported source*
- ☐ Requesting modification of existing permit†‡
- ☐ Change in emissions, throughputs or equipment‡
- ☐ Transfer of ownership (List previous owner in REMARKS section of box A.)‡
- ☐ Previous APEN is expiring‡
- ☐ Request for Emission Reduction Credit†‡
- ☐ (Specify)

* Complete all applicable portions of APEN
† Complete "Requested Level" values for permit limits
‡ Complete all information above box A, and those remaining portions which reflect changes

Emissions for all four turbines combined.

Signature of Person Legally Authorized to Supply Data: P R Steinway DATE: 4/28/99

Typed Name and Title: Paul R. Steinway, Vice President, KN Power Company

DATA YEAR (See Instructions on Reverse):

Date source began or will begin operation: 4/15/2000

THIS NOTICE IS VALID FOR FIVE YEARS. A revised notice shall be filed prior to this expiration date, whenever a permit limitation must be modified, whenever control equipment is changed, and annually whenever a significant emission change occurs. For specific details see Regulation 3, Part A, § II.C.1. I:\CPUFORMS.98A\GEN_APEN.98A

A $100 FILING FEE IS REQUIRED FOR EACH NOTICE FILED.

Send completed forms with fees to:

Colorado Dept. of Public Health & Environment
Air Pollution Control Division
4300 Cherry Creek Drive South, APCD-SS-B1
Denver, Colorado 80246-1530

APEN # 1 of 2

For Information, Call (303) 692-3150

AIR POLLUTANT EMISSION NOTICE

PERMIT No.: _____ AIRS ID.: 123/0545/002

FIRM NAME KN Power Company

MAIL ADDRESS PO Box 188, Fort Lupton STATE: CO ZIP: 80621

PLANT NAME & LOCATION FREA One-half mile east of the intersection of County Roads 16 and 31, and south of County Road 16 COUNTY Weld

HOME-BASE FOR PORTABLE SOURCES

PERSON TO CONTACT REGARDING THIS INFORMATION Kevin S.Lewis, Air Sciences Inc. TITLE PHONE (303) 988-2960

GENERAL DESCRIPTION OF THIS PLANT'S FUNCTION Generate electricity FEDERAL TAX I.D. NO. 84-146-5528

A. GENERAL INFORMATION		Normal Operation of This Source			Process Seasonal Throughput (% of Annual)				ADDITIONAL INFORMATION OR REMARKS: Cooling Tower
No. of Employees	Land Area	Hours/Day	Days/Week	Weeks/Year	Dec-Feb	Mar-May	Jun-Aug	Sep-Nov	Information in sections A, B, and C represent a single cooling tower vent. The information in section E represents emissions from the cooling tower (all five vents).
Two	20 acres	24	7	52	25	25	25	25	

B. STACK OR VENT INFORMATION (Identify below which stack if plant has two or more; refer to attached sketch of plant layout)						
Height	Diameter	Temperature	Flow Rate	Velocity	Moisture	Plant ID No. for Stack
20 ft	11 ft	95°F	63,672 ACFM	670 ft/min	Saturated %	Section B represents a single cooling tower vent. All five identical vents are represented by the ID no., COOLTWR.

C. FUEL INFORMATION	Design Input Rate (10^6 BTU/HR)	Kind of Fuel Burned	Annual Fuel Consumption		Fuel Heating Value: (BTU/lb, BTU/gal, or BTU/SCF)	Per Cent by Weight		Seasonal Fuel Use (% of Annual Use)				Space Htg (% Ann.)
Description of Combustion Unit			Requested level First year level	Data year level		Sulfur (X.XX%)	Ash (XX.X%)	Dec-Feb	Mar-May	Jun-Aug	Sep-Nov	
N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Make/Model:												
Serial No. N/A												

D. PROCESS INFORMATION	Raw Materials Used	Raw Materials-Annual Consumption		Design Process Rate	Finished Product Description	Finished Product-Annual Output	
Description of Processing Unit	Description	Requested level	Data year level	(Specify Units/Hour)		Requested level	Data year level
Cooling Tower	Cooling water circulation	N/A	N/A	20,000 gpm	N/A	N/A	N/A
Make/Model: N/A							
Serial No.: N/A							

E. POLLUTION CONTROL EQUIPMENT			Overall Collection Efficiency	ESTIMATED EMISSIONS (TONS/YEAR) AT THROUGHPUTS REQUESTED ABOVE		ACTUAL EMISSIONS (DATA YEAR)	ESTIMATION METHOD
Pollutant	Type of Control Equipment			CONTROLLED	UNCONTROLLED		
	Primary	Secondary					
Particulate	None	None	N/A	3.02	3.02		Manufacturer's data
PM_{10}	None	None	N/A	1.08	1.08		Manufacturer's data
So_x	N/A	N/A	N/A				
NO_x	N/A	N/A	N/A				
VOC	N/A	N/A	N/A				
CO	N/A	N/A	N/A				

PLEASE USE APCD NON-CRITERIA REPORTABLE AIR POLLUTANT ADDENDUM FORM TO REPORT SUCH POLLUTANTS OR POLLUTANTS NOT LISTED ABOVE.

☐ CHECK HERE IF YOU WISH THE DIVISION TO CALCULATE YOUR EMISSIONS. SEE "EMISSION ESTIMATES" INSTRUCTIONS ON BACK.

CHECK ALL BOXES THAT APPLY

- ■ New or previously unreported source*
- ☐ Requesting modification of existing permit†‡
- ☐ Change in emissions, throughputs or equipment‡
- ☐ Transfer of ownership (List previous owner in REMARKS section of box A)‡
- ☐ Previous APEN is expiring‡
- ☐ Request for Emission Reduction Credit†‡
- ☐ (Specify) _____

* Complete all applicable portions of APEN
† Complete "Requested Level" values for permit limits
‡ Complete all information above box A, and those remaining portions which reflect changes

RECEIVED
JUN 1999
Air Pollution Control Division
Stationary Sources Program

Signature of Person Legally Authorized to Supply Data: DATE: 6/17/99

Typed Name and Title:
Paul R. Steinway, Vice President, KN Power Company

DATA YEAR (See Instructions on Reverse):

Date source began or will begin operation: 4/15/2000

THIS NOTICE IS VALID FOR FIVE YEARS. A revised notice shall be filed prior to this expiration date, whenever a permit limitation must be modified, whenever control equipment is changed, and annually whenever a significant emission change occurs. For specific details see Regulation 3, Part A, § II.C.1

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A $100 FILING FEE IS REQUIRED FOR EACH NOTICE FILED.

Send completed forms with fees to:

Colorado Dept. of Public Health & Environment
Air Pollution Control Division
4300 Cherry Creek Drive South, APCD-SS-B1
Denver, Colorado 80246-1530

APEN #_1_ of_1_

For Information, Call (303) 692-3150

STATE OF COLORADO

COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT
AIR POLLUTION CONTROL DIVISION
TELEPHONE: (303) 692-3150

DRAFT

CONSTRUCTION PERMIT

PERMIT NO: 98-WE-0815

INITIAL APPROVAL

DATE ISSUED: 7/1/99

ISSUED TO: KN POWER COMPANY

THE SOURCE TO WHICH THIS PERMIT APPLIES IS DESCRIBED AND LOCATED AS FOLLOWS:

- Electric power generation facility, known as **KN Power Electric Generation Station**, located in the Northeast ¼ of the Northwest ¼ of Section 34, Township 2 North, Range 66 West, 0.5 mile east of the intersection of County Roads 16 and 31, south of County Road 16, northeast of Fort Lupton, in Weld County, Colorado.

THE SPECIFIC EQUIPMENT OR ACTIVITY SUBJECT TO THIS PERMIT INCLUDES THE FOLLOWING:

This is a facility-wide permit covering the following emission sources:

AIRS ID	Description
001	Four (4) General Electric, Model: LM6000, S/Ns: not available (AIRS IDs: 001A, 001B, 001C and 001D), natural gas fired simple-cycle combustion turbines, each rated at a heat input of 334,280,000 BTU per hour based on lower heat value of gas, powering electric generators, each site output rated at 40 Megawatts. Emissions of Oxides of Nitrogen are controlled by water injection.
002	One (1) Make, Model and S/Ns: not available evaporative water cooling tower, with five(5) cells, rated at a total circulation of 20,000 gallons per minute. These are equipped with drift eliminators which control the drift loss to a maximum of 0.004 %.

DRAFT 7/1/99

THIS PERMIT IS GRANTED SUBJECT TO ALL RULES AND REGULATIONS OF THE COLORADO AIR QUALITY CONTROL COMMISSION AND THE COLORADO AIR POLLUTION PREVENTION AND CONTROL ACT (C.R.S. 25-7-101 et seq), TO THOSE GENERAL TERMS AND CONDITIONS SET FORTH ON THE REVERSE SIDE OF THIS DOCUMENT AND THE FOLLOWING SPECIFIC TERMS AND CONDITIONS:

1. Within one hundred and eighty days (180) after commencement of operation, compliance with the conditions contained on this permit shall be demonstrated to the Division. It is the permittee's responsibility to self certify compliance with the conditions. Failure to demonstrate compliance within 180 days may result in revocation of the permit. (Information on how to certify compliance was mailed with the permit or can be obtained from the Division at 303-692-3209.)

2. The manufacturer, model number and serial number of the subject equipment shall be provided to the Division prior to Final Approval. (Reference: Reg. 3, Part B, IV. E.)

3. Visible emissions shall not exceed twenty percent (20%) opacity during normal operation of the source. During periods of startup, process modification, or adjustment of control equipment visible emissions shall not exceed 30% opacity for more than six minutes in any sixty consecutive minutes. Opacity shall be measured by EPA Method 9. (Reference: Regulation 1, Section II. A. 1. & 4.)

4. This source is subject to the odor requirements of Regulation No. 2. (State only enforceable)

5. AIRS ID numbers (for example, "AIRS ID: 006") shall be marked on the subject equipment for ease of identification. (Reference: Reg. 3, Part B, IV. E.) (State only enforceable)

7/1/99

6. This source shall be limited to throughput as listed below and all other activities, operational rates and numbers of equipment as stated in the application. Monthly records of the actual throughput shall be maintained by the applicant and made available to the Division for inspection upon request. (Reference: Regulation 3, Part B, III. A. 4)

Consumption of natural gas for combustion in each simple-cycle combustion turbines shall not exceed 3,080,000,000 SCF per year, and 256,667,000 SCF per month. These are based on a low heat value of gas of 950 BTU per SCF.

Water circulation in the evaporative cooling tower shall not exceed 10,512,000,000 gallons per year and 876,000,000 gallons per month.

During the first twelve (12) months of operation, compliance with both the monthly and yearly production limitations shall be required. After the first twelve (12) months of operation, compliance with only the yearly limitation shall be required. Compliance with the yearly production limits shall be determined on a rolling twelve (12) month total.

7. Prevention of Significant Deterioration (PSD) requirements shall apply to this source at any such time that this source becomes major solely by virtue of a relaxation in any permit condition. Any relaxation that increases the potential to emit above the applicable PSD threshold will require a full PSD review of the source as though construction had not yet commenced on the source. The source shall not exceed the PSD threshold until a PSD permit is granted. (Reference: Reg.3, Part B, IV. D. 3. b.(iv))

7/1/99

8. Emissions of air pollutants shall not exceed the following limitations (as calculated in the Division's preliminary analysis): Compliance with the annual limits shall be determined on a rolling (12) month total. By the end of each month a new twelve month total is calculated based on the previous twelve months data. The permit holder shall calculate monthly emissions and keep a compliance record on site for Division review. (Reference: Regulation 3, Part B, III.E.4)

From all combustion turbines, together:

Volatile Organic Compounds:	52.6 tons per year
	4.4 tons per month
Particulate Matter:	87.6 tons per year
	7.3 tons per month
Particulate Matter < 10 μm [PM-10]:	87.6 tons per year
	7.3 tons per month
Nitrogen Oxides:	247.5 tons per year
Carbon Monoxide:	247.5 tons per year
Sulfur Dioxide:	3.6 ton per year
	0.3 ton per month

From evaporative cooling tower:

Particulate Matter:	3.02 tons per year
	0.26 ton per month
Particulate Matter < 10 μm [PM-10]:	1.08 tons per year
	0.10 ton per month

For the first twelve (12) months of operation, compliance with monthly limits, for pollutants other than Nitrogen Oxides and Carbon Monoxide is required. For Nitrogen Oxides and Carbon Monoxide, for first twelve months of operation, cumulative emissions limits, at the end of the periods specified in the following table, shall not be exceeded:

Pollutant	Cumulative emission limit/s, tons, at the end of,					
	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6
Nitrogen Oxides	55.35	110.70	166.05	221.40	247.50	247.50
Carbon Monoxide	65.47	130.94	196.41	247.50	247.50	247.50

Pollutant	Cumulative emission limit/s at the end of, tons					
	Month 7	Month 8	Month 9	Month 10	Month 11	Month 12
Nitrogen Oxides	247.50	247.50	247.50	247.50	247.50	247.50
Carbon Monoxide	247.50	247.50	247.50	247.50	247.50	247.50

After the first twelve months of operation, compliance with only the yearly limitation is required.

Compliance with emission limits for Nitrogen Oxides and Carbon Monoxide shall be demonstrated by the continuous emission monitoring (CWM) data. The Division may take direct enforcement action based on the CEM data.

9. Representative samples of circulating water in the evaporative cooling towers shall be analyzed for Total Dissolved Solids, at least once in a month. Records shall be maintained of such analysis. This analysis shall be used while calculating the actual emissions from the cooling towers.

10. Emissions of Nitrogen Oxides and Carbon Monoxide (each pollutant) from the entire facility (including all insignificant activities) shall not exceed 249 tons per year (rolling 12 month). The applicant shall track emissions from all insignificant activities on a yearly basis. This information shall be made available to the Division for inspection upon request. For the purposes of this condition, insignificant activities shall be defined as any activity or equipment which emits any amount but does not require an Air Pollutant Emission Notice (APEN).

11. The combustion turbines covered under this permit may be replaced in accordance with the provisions of the Alternative Operating Scenario listed in Attachment A. (Reference: Regulation 3, Part A, Section IV, A)

12. Source compliance tests shall be conducted on the combustion turbines to measure the emission rate(s) for the pollutants listed below in order to:

Show compliance with emission limits for the turbine exhausts. Maximum emission rates obtained shall be used for demonstration of compliance with emission limits for pollutants other than Nitrogen Oxides and Carbon Monoxide. If the total emissions of any of the non-criteria reportable pollutant exceeds the reporting thresholds, Air Pollutant Emission Notice shall be submitted.

The test protocol must be in accordance with the requirements of the Air Pollution Control Division Compliance test Manual and shall be submitted to the Division for review and approval at least thirty (30) days prior to testing. No compliance test shall be conducted without prior approval from the Division. Any stack test conducted to show compliance with a monthly or annual emission limitations, for pollutants other than Nitrogen Oxides and Carbon Monoxide, shall have the results projected up to the monthly or annual averaging time by multiplying the test results by the allowable number of operating hours for that averaging time (Reference: Regulation 3, Part B. IV. H. 3)

Volatile Organic Compounds speciated for non-criteria reportable / hazardous air pollutants using EPA approved methods.
Particulate Matter using EPA approved methods. This shall include condensables.

13. Prior to scheduling of the stack tests, the applicant shall submit to the Division for approval an operating and maintenance plan for all control equipment and control practices, and a proposed record keeping format that will outline how the applicant will maintain compliance on an ongoing basis with the requirements of this permit. (Reference: Reg. 3, Part B, IV. B. 2)

14. The combustion turbines are subject to Regulation No. 6 - Standards of Performance for New Stationary Sources, Part A - Federal Register Regulations Adopted By Reference, Subpart GG - Standards of Performance for Stationary Gas

Turbines, including, but not limited to, the following:

a. Gases discharged into the atmosphere shall not contain nitrogen oxides in excess of 75 parts per million, volume, dry basis, at 15 % oxygen. Compliance with the emission limits specified elsewhere in this permit will satisfy this requirement.

b. Gases discharged into the atmosphere shall not contain sulfur dioxide in excess of 150 parts per million, volume, dry basis, at 15 % oxygen. Alternatively, fuel combusted in the gas turbines shall not contain sulfur in excess of 0.8 percent by weight.

In addition, the following requirements of Regulation No. 6, Part A, Subpart A, General Provisions, apply:

c. At all times, including periods of start-up, shutdown, and malfunction, the facility and control equipment shall, to the extent practicable, be maintained and operated in a manner consistent with good air pollution control practices for minimizing emissions. Determination of whether or not acceptable operating and maintenance procedures are being used will be based on information available to the Division, which may include, but is not limited to, monitoring results, opacity observations, review of operating and maintenance procedures, and inspection of the source. (Reference: Regulation 6, Part A. General Provisions from 40 CFR 60.11)

d. No article, machine, equipment or process shall be used to conceal an emission which would otherwise constitute a violation of an applicable standard. Such concealment includes, but is not limited to, the use of gaseous diluents to achieve compliance with an opacity standard or with a standard which is based on the concentration of a pollutant in the gases discharged to the atmosphere. (§ 60.12)

e. Written notification of construction and initial startup dates shall be submitted to the Division as required under § 60.7.

f. Records of startups, shutdowns, and malfunctions shall be maintained, as required under § 60.7.

g. Written notification of continuous monitoring system demonstrations shall be submitted to the Division as required under § 60.7.

h. Written notification of opacity observation or monitor demonstrations shall be submitted to the Division as required under § 60.7.

j. Excess Emission and Monitoring System Performance Reports shall be submitted as required under § 60.7.

k. Performance tests shall be conducted as required under § 60.8.

l. Compliance with opacity standards shall be demonstrated according to § 60.11.

m. Continuous monitoring systems shall be maintained and operated as required under § 60.13.

A copy of the complete applicable subpart(s) is attached.

15. For each combustion turbine, a continuous emission monitoring system (CEM) shall be installed, calibrated, and operated to determine and record:

a. Combustion fuel flow rate.
b. Concentration of Oxides of Nitrogen, ppmvd hourly average.
c. Emissions of Oxides of Nitrogen, lb/hr, tons/month, tons/rolling 12-month.
d. Concentration of Carbon Monoxide, ppmvd hourly average.
e. Emissions of Carbon Monoxide, lb/hr, tons/month, tons/rolling 12-month.
f. Concentration of oxygen, percent hourly average.
g. Water flow for injection into the turbine.

Quality assurance / quality control shall conform to 40 CFR Part 60, Appendix F, and Subpart A.

Quality-assured data shall be available, for a minimum of 90 percent of the periods of operation of the turbines.

Provisions of 40 CFR Part 60, Subpart A - General Provisions, shall be followed for notification, record keeping, and monitoring.

For periods of operation when quality-assured data is not available, the highest hourly average recorded emission rate during the previous ninety (90) days shall be used to calculate the emissions during those periods.

The CEM data shall be used to determine compliance with the permit conditions.

16. A Revised Air Pollutant Emission Notice (APEN) shall be filed: (Reference: Reg. 3, Part A, II.C)

a. Annually, whenever a significant increase in emissions occurs as follows:

For any criteria pollutant:

For sources emitting **less than 100 tons per year**, a change in actual emissions of five tons per year or more, above the level reported on the last APEN; or

For VOC sources in ozone non-attainment areas emitting less than 100 tons of VOC per year, a change in actual emissions of one ton per year or more or five percent, whichever is greater, above the level reported on the last APEN submitted; or

For sources emitting **100 tons per year or more**, a change in actual emissions of five percent or 50 tons per year or more, whichever is less, above the level reported on the last APEN submitted; or

A change in actual emissions, above the level reported on the last APEN submitted, of 50 pounds of lead.

For any non-criteria reportable pollutant:

If the emissions increase by 20% or five (5) tons per year, whichever is less, above the level reported on the last APEN submitted to the Division.

b. Whenever there is a change in the owner or operator of any facility, process, or activity; or

c. Whenever new control equipment is installed, or whenever a different type of control equipment replaces an existing type of control equipment; or

d. Whenever a permit limitation must be modified; or

e. No later than 30 days before the existing APEN expires.

DRAFT

7/1/99

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7/1/99

Ram N. Seetharam
Permit Reviewer

Dennis Myers P.E.
Unit Leader
Construction Permits Unit
Stationary Sources Program
Air Pollution Control Division

KN POWER COMPANY - ELECTRIC POWER GENERATION STATION
Permit No. 98-WE-0815
Initial Approval

Notes to Permit Holder:

1) The production / throughput or raw material processing limits and emission limits contained in this permit are based on the production/processing rates requested in the permit application. These limits may be revised upon request of the permittee providing there is no exceedance of any specific emission control regulation or any ambient air quality standard. A revised air pollution emission notice (APEN) and application form must be submitted with a request for a permit revision.

2) The emission levels contained in this permit are based on the following emission factors:

Pollutant	Emission Factor pound per process unit	Process Unit	Remarks
Particulate Matter (PM)	Max. rate from test data	SCFE6 gas	natural gas combustion in simple-cycle combustion turbines equipped with water injection for control of oxides of nitrogen. Emissions of non-criteria reportable pollutants have been declared to be below APEN thresholds
PM-10 (PM < 10 μm)			
Volatile Organic Compounds			
Oxides of Nitrogen	CEM data		
Carbon Monoxide	CEM data		
Particulate Matter (PM)	0.5746	GALE6	Maximum drift loss of 0.004 %. Total dissolved solids: 5,500 ppmw.
PM-10 (PM < 10 μm)	0.2055		

3) This source is classified as a:

Synthetic Minor Stationary Source for PSD applicability.
Major Source for applicability of operating permit.

4) This source is subject to the provisions of Regulation number 3, Part C, Operating Permits (Title V of the 1990 Federal Clean Air Act Amendments). The application for the Operating Permit is due within one year of commencing operation.

KN POWER COMPANY - ELECTRIC POWER GENERATION STATION
Permit No. 98-WE-0815
Initial Approval

5) This source is subject to the Common Provisions Regulation Part II, Subpart E, Upset Conditions and Breakdowns. The permittee shall notify the Division of any upset condition which causes a violation of any emission limit or limits stated in this permit as soon as possible, but no later than two (2) hours after the start of the next working day, followed by written notice to the Division explaining the cause of the occurrence and that proper action has been or is being taken to correct the conditions causing said violation and to prevent such excess emission in the future.

6) The following emissions of non-criteria reportable air pollutants are estimated based upon the material consumptions / throughput limits. This information is listed to inform the operator of the Division's analysis of the specific compounds. This information is listed on the Division's emission inventory system.

C.A.S. #	SUBSTANCE	EMISSIONS [LB/YR]
	NONE	0.0

The applicant has declared that the emissions of all non-criteria reportable / hazardous air pollutants are below the reporting thresholds. A testing requirement has been included.

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7/1/99

ATTACHMENT A

ALTERNATIVE OPERATING SCENARIOS FOR REPLACEMENT OF COMBUSTION TURBINES.

Alternative Operating Scenario for Sources with Continuous Emission Monitoring Systems

The following Alternative Operating Scenario (AOS) for temporary and permanent combustion turbine replacement has been reviewed in accordance with the requirements of Regulation No. 3., Part A, Section IV. A, Operational Flexibility-Alternative Operating Scenarios, and Regulation No. 3, Part B, Construction Permits, and has been found to meet all applicable substantive and procedural requirements. This permit incorporates and shall be considered a construction permit for any combustion turbine replacement performed in accordance with this AOS, and the permittee shall be allowed to perform such turbine replacement without applying for a revision to this permit or obtaining a new Construction Permit.

For purposes of Regulation No. 3, Part B, Section IV. G. 4. a., any turbine replacement authorized under this AOS shall commence operation upon notation of same in the contemporaneous log as required below. Results of any testing required below shall be normalized for comparison to the applicable permitted emission limits.

1. **Turbine Replacement**

The following AOS is incorporated into this construction permit in order to deal with a turbine breakdown or periodic routine maintenance and repair which requires the use of either a temporary or permanent replacement turbine. Note that the compliance demonstrations made as part of this AOS are in addition to any compliance demonstrations required by the permit.

1.1. The permittee may replace an existing turbine provided such replacement turbines are **GE LM6000** combustion turbines without modifying this permit.

1.2 Replacement turbines are subject to all federally applicable and state-only requirements set forth in this permit (including monitoring and record keeping).

1.3 The permittee shall maintain a log on-site to contemporaneously record the date of any turbine replacement, the manufacturer, model number, and serial number of the turbine(s) that are replaced during the term of this permit, and the manufacturer, model number, and serial number of the replacement turbine. All records related to any testing shall be maintained on-site for five (5) years and made available to the Division upon request.

1.4 An Air Pollutant Emissions Notice (APEN) (that includes the specific manufacturer, model and serial number of the permanent replacement turbine) shall be filed with the Division for the permanent replacement turbine within 14 calendar days of commencing operation of the replacement. The APEN shall be accompanied by the appropriate APEN filing fee and a cover letter explaining that the permittee is exercising an alternative operating scenario and is installing a permanent replacement turbine.

1.5 For the purposes of this AOS, the word "turbine" shall refer to the "gas generator" section of the turbine, the combustion chamber, or any other part or section of the turbine that the Division determines may result in an increase in emissions from the turbine.

1.6 The permittee shall agree to pay fees based on the normal permit processing rate for review of information submitted to the Division in regard to any turbine replacement.

2. **Additional Sources**

Current State Air Quality Regulations do not allow for advanced New Source Review in the absence of discrete and verifiable information concerning future installations. Therefore, any additional operational changes requiring new equipment at this facility not addressed by these Alternative Operating Scenarios will need to undergo appropriate Regulation No. 3 review procedures.

KN cooking with gas

The Denver Post / Andy Cross

KN Energy Vice President Paul Steinway stands near a gas turbine building at the company's Fort Lupton plant.

Lakewood energy firm using hot fuel

By Steve Raabe
Denver Post Business Writer

If pushing hot air through a turbine to make electricity sounds simple, then KN Energy is riding the low-tech wave right into the 21st century.

The technology is decades old. But with sporadic power shortages throughout the country and deregulation sweeping the power industry, Lakewood's KN and others in the natural-gas industry are ready to jump into gas-generated electricity.

Currently, gas accounts for only 10 percent of the nation's electrical power. The heavyweight fuels are coal, with 55 percent of the market, and nuclear with 21 percent. But their era may be waning.

Gas, energy experts say, is cleaner, more efficient and, most importantly, far cheaper to build new plants for than coal or nuclear.

"There's clearly a market, a huge market, for gas-fired power," [illegible] and parts of the country are destined to be power short for a number of years," Wagner said. "The answer is probably not in more coal-fired plants. Gas may be the answer."

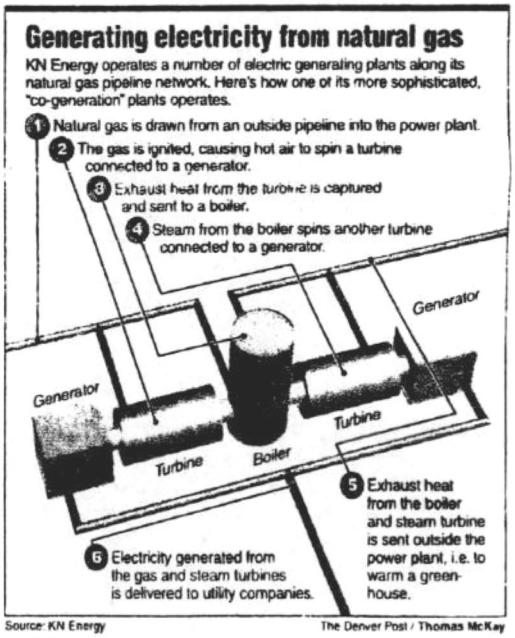
KN Energy already is dabbling in electric generation, but on a small scale.

With second-quarter revenue of $1.2 billion, KN Energy's mere $2.2 million from selling generated power is barely enough to be noticed.

After all, KN has built its reputation as one of the nation's largest natural-gas pipeline operators, not as a penny-ante power producer.

But last summer's power shortage in Colorado and this year's heat wave in the East and Midwest have upped the stakes considerably.

Utilities are scrambling to find more power, and KN is ready with 25,000 miles of gas pipeline that can carry 12 billion cubic feet of gas a day. If all of the gas were



Source: KN Energy

The Denver Post / Thomas McKay

When KN announced last month its plan for an $810 million merger with Houston gas company [illegible] versing KN's declining financial performance.

[illegible] but certainly they are a significant development for us," said Kinder, who will become chairman and CEO of KN upon completion of the merger.

Last year's acquisition by KN of three gas-fired power plants in Colorado converted the firm, overnight, from just a pipeline company to the state's largest independent power producer.

The three plants — one in Fort Lupton and two in Greeley — represent 10 percent of Colorado's electric generation capacity.

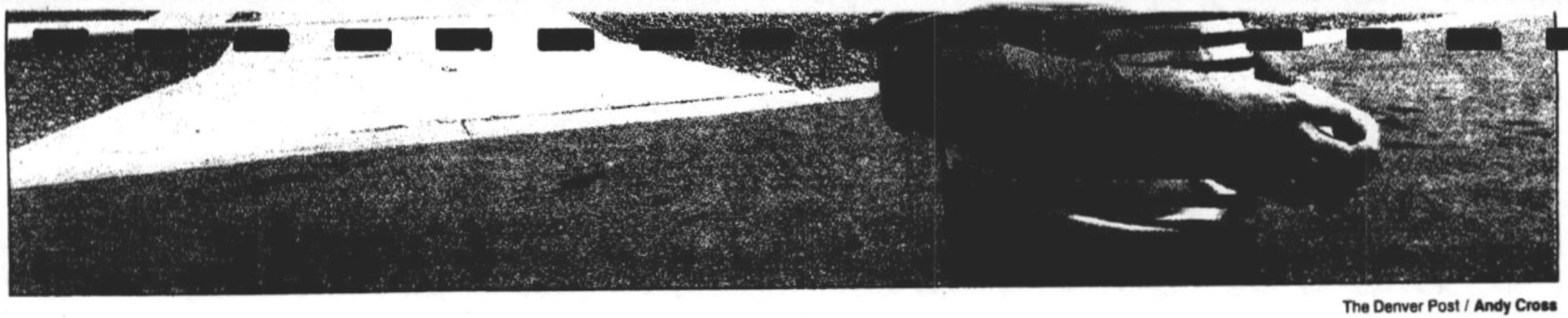
That was the first step. Now, KN is embarking on a $2.5 billion plan to build 10 additional plants across the country.

"There's going to be significant growth in the need for electricity," said Jay Hopper, vice president and general manager of KN Power, a subsidiary of KN Energy. "We want to serve that growth."

Analysts say the need for more power is indisputable.

On the supply side, nuclear plants are being decommissioned across the United States. In addition, the uncertainties of industry deregulation have made utility companies leery of spending huge amounts to build new generation.

At the same time, demand for power has been rising with population increases and economic growth.



The Denver Post / Andy Cross

KN Energy Vice President Paul Steinway stands near a gas turbine building at the company's Fort Lupton plant.

Lakewood energy firm using hot fuel

By Steve Raabe
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"There are power shortages now, and parts of the country are destined to be power short for a number of years," Wagner said. "The answer is probably not in more coal-fired plants. Gas may be the answer."

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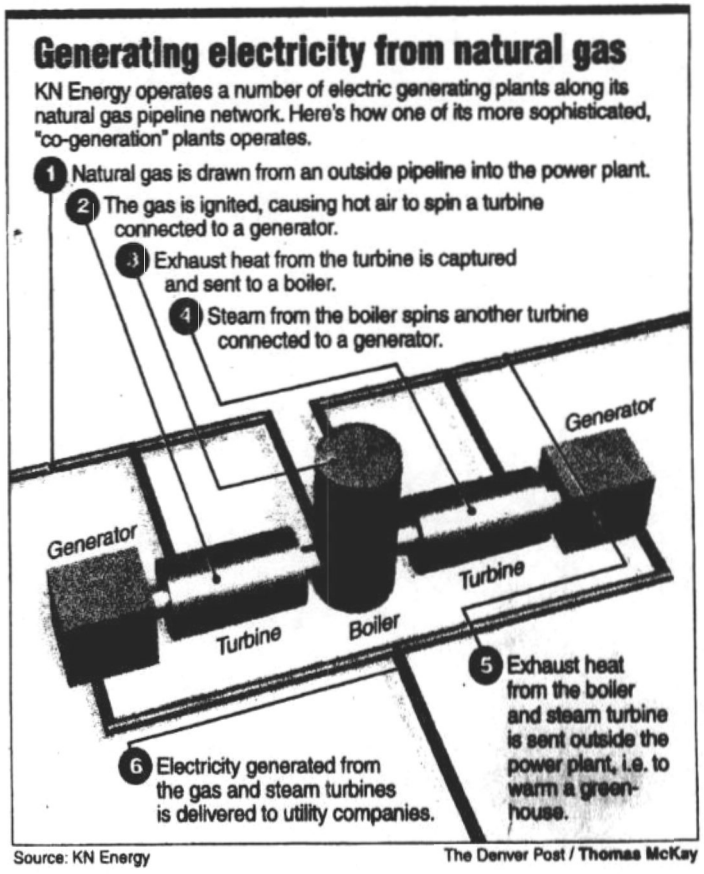
Utilities are scrambling to find more power, and KN is ready with 25,000 miles of gas pipeline that can carry 12 billion cubic feet of gas a day. If all of the gas were used for power generation — an unlikely scenario, officials say — it could supply enough electricity for 48 million homes.



Source: KN Energy

The Denver Post / Thomas McKay

When KN announced last month its plan for an $810 million merger with Houston gas company Kinder Morgan Inc., CEO Richard Kinder said electricity generation will be one of the solutions for reversing KN's declining financial performance.

KN posted a second-quarter operating loss of $14.9 million.

Power plants "are not something we will bet the company on, but certainly they are a significant development for us," said Kinder, who will become chairman and CEO of KN upon completion of the merger.

Last year's acquisition by KN of three gas-fired power plants in Colorado converted the firm, overnight, from just a pipeline company to the state's largest independent power producer.

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Please see ENERGY on 8E

Lakewood's KN Energy turning to natural gas

ENERGY from Page 1E

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By contrast, conventional plants that use coal or nuclear fuel for generation aren't as nimble. If they shut down, they then require several hours to regain full generation. KN estimates that gas plants are 70 percent more energy efficient than conventional plants.

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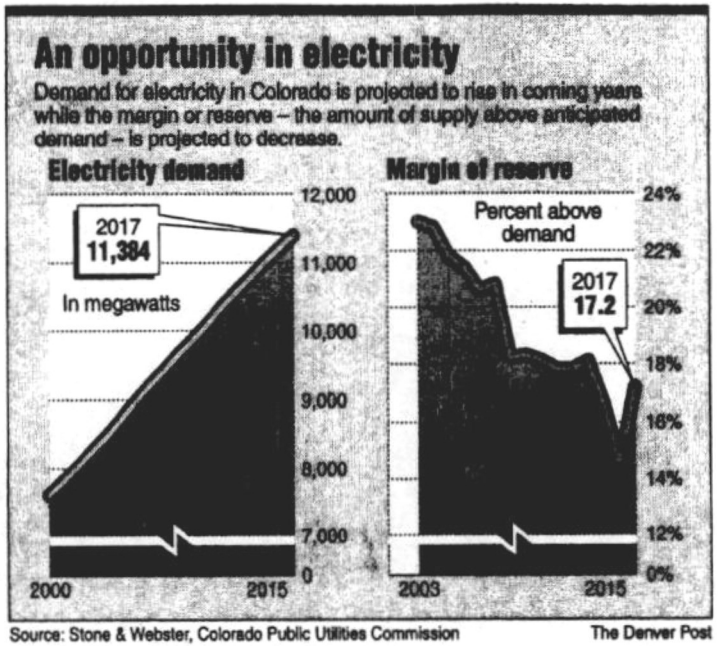

Source: Stone & Webster, Colorado Public Utilities Commission — The Denver Post

KN cooking with gas

The Denver Post / Andy Cross

KN Energy Vice President Paul Steinway stands near a gas turbine building at the company's Fort Lupton plant.

Lakewood energy firm using hot fuel

By Steve Raabe
Denver Post Business Writer

If pushing hot air through a turbine to make electricity sounds simple, then KN Energy is riding the low-tech wave right into the 21st century.

The technology is decades old. But with sporadic power shortages throughout the country and deregulation sweeping the power industry, Lakewood's KN and others in the natural-gas industry are ready to jump into gas-generated electricity.

Currently, gas accounts for only 10 percent of the nation's electrical power. The heavyweight fuels are coal, with 55 percent of the market, and nuclear with 21 percent. But their era may be waning.

Gas, energy experts say, is cleaner, more efficient and, most importantly, far cheaper to build new plants for than coal or nuclear.

"There's clearly a market, a huge market, for gas-fired power," [illegible] and parts of the country are destined to be power short for a number of years," Wagner said. "The answer is probably not in more coal-fired plants. Gas may be the answer."

KN Energy already is dabbling in electric generation, but on a small scale.

With second-quarter revenue of $1.2 billion, KN Energy's mere $2.2 million from selling generated power is barely enough to be noticed.

After all, KN has built its reputation as one of the nation's largest natural-gas pipeline operators, not as a penny-ante power producer.

But last summer's power shortage in Colorado and this year's heat wave in the East and Midwest have upped the stakes considerably.

Utilities are scrambling to find more power, and KN is ready with 25,000 miles of gas pipeline that can carry 12 billion cubic feet of gas a day. If all of the gas were but certainly they are a significant development for us," said Kinder, who will become chairman and CEO of KN upon completion of the merger.

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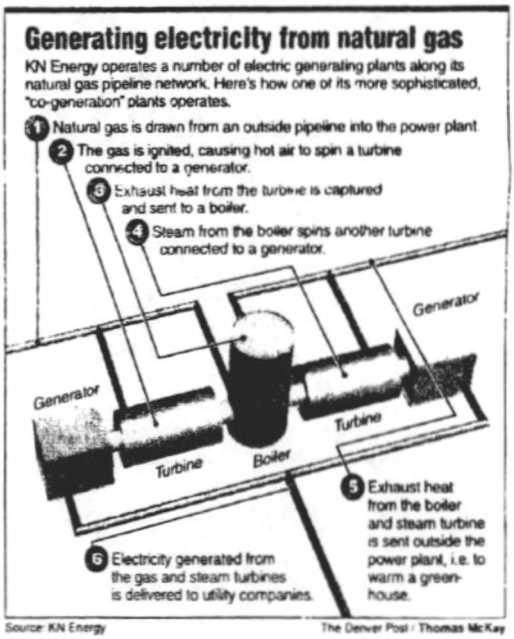
Generating electricity from natural gas

KN Energy operates a number of electric generating plants along its natural gas pipeline network. Here's how one of its more sophisticated, "co-generation" plants operates.



Source: KN Energy

The Denver Post / Thomas McKay

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"There's clearly a market, a huge market, for gas-fired power," said Stu Wagner, an energy-industry analyst with Denver investment-banking firm Petrie Parkman & Co.

"There are power shortages now, and parts of the country are destined to be power short for a number of years," Wagner said. "The answer is probably not in more coal-fired plants. Gas may be the answer."

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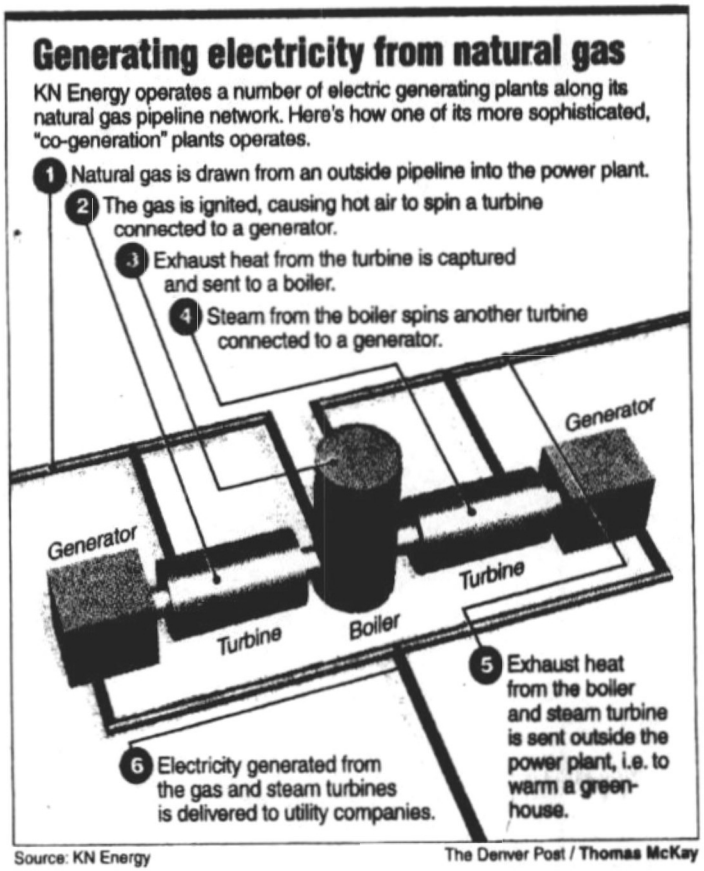

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The Denver Post / Thomas McKay

When KN announced last month its plan for an $810 million merger with Houston gas company Kinder Morgan Inc., CEO Richard Kinder said electricity generation will be one of the solutions for reversing KN's declining financial performance.

KN posted a second-quarter operating loss of $14.9 million.

Power plants "are not something we will bet the company on, but certainly they are a significant development for us," said Kinder, who will become chairman and CEO of KN upon completion of the merger.

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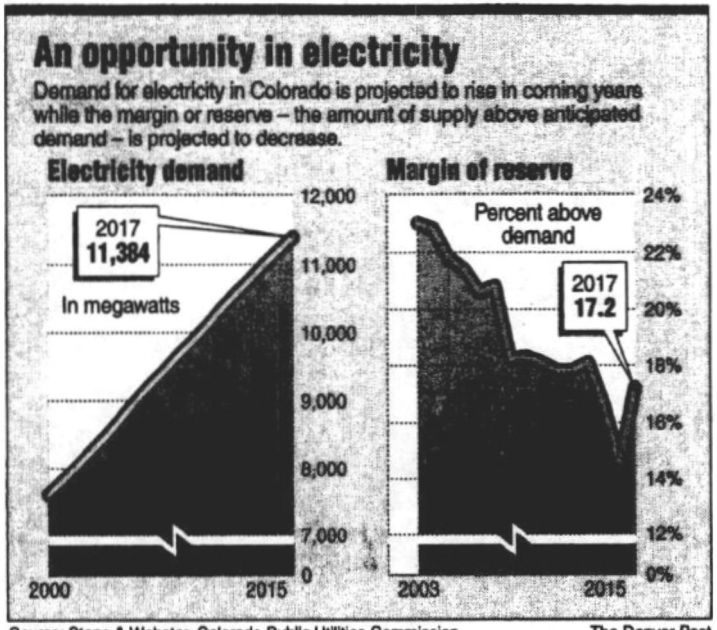

STATE OF COLORADO

Bill Owens, Governor
Jane E. Norton, Executive Director

Dedicated to protecting and improving the health and environment of the people of Colorado

4300 Cherry Creek Dr. S.
Denver, Colorado 80246-1530
Phone (303) 692-2000
Located in Glendale, Colorado

Laboratory and Radiation Services Division
8100 Lowry Blvd.
Denver CO 80220-6928
(303) 692-3090

http://www.cdphe.state.co.us

Colorado Department of Public Health and Environment

August 17, 1999

Mr. Paul Steinway
Vice President
KN Power
Thermo CoGen
P.O. Box 188
6833 Weld County Road 31
Ft. Lupton, CO 80621

Mr. Frank Prager
Associate General Counsel
Public Service Company
P. O. Box 840
Denver, CO 80201-0840

Dear Mssrs. Steinway and Prager:

As you know the Air Pollution Control Division has been exploring the major source status of the new KN Power turbine additions to the Ft. Lupton Thermo Cogen facility. To determine whether two sources constitute a single stationary source, the federal and state law require that we look to whether the sources are (1) located on contiguous or adjacent property; (2) have the same SIC code; and (3) are under common ownership or control. Clearly the KN Power turbines and Thermo Cogen facility meet the test for numbers 1 and 2; we are currently looking into whether number three above has been met.

Initially, the Division began processing the KN Power turbines permit under the assumption that the turbines could be considered a separate synthetic minor source. Upon review of the file, however, it appears that you are the vice president for both the Thermo and KN Power facilities. Additionally, workers at both facilities have made statements to both Division inspectors as well as the permit engineer for the KN Power permit that both facilities are owned by KN Power and are co-managed. These facts have caused to the Division to question whether KN Power can legally be considered a separate source from the Thermo Cogen facility because there appears to be common management or control, if not common ownership. We have spoken to you about

this concern and asked that you have your attorneys for both facilities contact the Assistant Attorney General for the Division, John Cyran. He can be reached at 303-866-5358.

Last Thursday it came to our attention that there are currently two backup generators located at the same Ft. Lupton site; the KN Power application for the turbines did not mention these generators, which are in and of themselves considered a major source. They are owned by Public Service Company. As your letter dated June 29, 1999 stated, the new KN Power turbines are 50% owned by New Century Energy, formerly, Public Service Company. Because of this fact, the KN Power turbines must be permitted by the Division as a major modification to a PSD source. You may wish to limit the hours of operation on the backup generators, and accept federally enforceable limits on fuel consumption through the construction permit process in order to limit the potential to emit of the backup generators to below major source levels. If the backup generators obtain an enforceable limit on their PTE, and if the back up generators and the new KN turbines are ultimately considered to be separate from the Thermo Cogen facility, then the Division could process the turbine permits as a synthetic minor modification to the backup generators. Until the common ownership and control issue has been resolved, however, we will not be able to reprocess the permit for these new turbines. Once again, I would ask that you or KN Power and Thermo Cogen's legal counsel contact Mr. Cyran at the above number within 14 days. In the meantime, the Division will continue to keep permit 98WE0815 on hold.

Please feel free to contact me at 303.692.3176 if you have any questions.

Sincerely,

Dennis Myers, P.E.
Construction Permit Unit Leader

cc: Margie Perkins, Dave Ouimette, Julie Wrend, APCD
John Cyran, Attorney General's Office

K N Energy, Inc.
370 Van Gordon Street
P.O. Box 281304
Lakewood, CO 80228-8304
(303) 989-1740

September 2, 1999

Mr. Dennis Myers
Air Pollution Control Division
Colorado Department of Public Health and Environment
4300 Cherry Creek Drive South
Denver, Colorado 80246-1530

Re. No Common Control of Ft. Lupton Power Plants

Dear Mr. Myers:

In the context of your review of the current application for a synthetic minor construction permit for the Ft. Lupton power plant owned by Front Range Energy Associates, L.L.C., you have asked whether there is any relationship between this facility and the existing cogeneration plant in Ft. Lupton owned by Thermo Cogeneration Partnership, L.P. In particular, I understand you are concerned that the two facilities might be considered "under the control of the same person (or persons under common control)"[1] thereby subjecting the two facilities to PSD review. I believe this concern may be related to inaccuracies reported or implied in the Denver Post article of August 9, 1999. As demonstrated below, there is no common control of these two facilities, therefore the PSD requirements do not apply.

DESCRIPTION OF OWNERSHIP OF EXISTING AND NEW FT. LUPTON FACILITIES

A factor to be considered in the determination of whether two facilities should be considered "under the control of the same person (or persons under common control" is whether there is common ownership. Consistent with what we have previously submitted to the state, the proposed new power plant to be constructed at Ft. Lupton will be owned by Front Range Energy Associates, L.L.C., a Delaware limited liability company ("Front Range"). Front Range in turn is owned fifty percent by Quixx Mountain Holding, L.L.C., a Delaware limited liability company ("Quixx Mountain")

[1] I understand that the definition for "Stationary Source" under the Air Quality Control Commission's Common Provisions differs from the EPA definition for "Building, structure, facility, or installation" and for "major source," however we believe the Division can and should interpret the Commission's definition consistent with EPA guidance for purposes of PSD evaluation. *See*, §§ 25-7-105(1)(c), 25-7-105.1, and 25-7-114(3), C.R.S.

and FR Holdings, L.L.C., a Colorado limited liability company ("FR Holdings"). Quixx Mountain is wholly owned by Quixx Corporation, a wholly owned subsidiary of New Century Energies, Inc. and FR Holdings is wholly owned by KN Power Company, a wholly owned subsidiary of KN Energy, Inc.

The existing cogeneration plant in Ft. Lupton is owned by Thermo Cogeneration Partnership, L.P., a Delaware limited partnership ("Thermo Cogeneration"). Thermo Cogeneration in turn is owned by CSW Ft. Lupton, Inc., which owns a 1% general partnership interest and a 49% limited partnership interest, and Thermo Ft. Lupton, L.P., which also owns a 1% general partnership interest and a 49% limited partnership interest. CSW Ft. Lupton, Inc. is a wholly owned subsidiary of CSW Energy, Inc. and Thermo Ft. Lupton, L.P. is owned indirectly by Mr. Jay Monroe, either personally or as trustee, and by Mr. Curtis Jensen.

As described above, the proposed new power plant and the existing cogeneration plant are not under common ownership, either directly or indirectly.

DESCRIPTION OF MANAGEMENT OF EXISTING AND NEW FT. LUPTON FACILITIES

An evaluation of the management structure of the two Ft. Lupton facilities also confirms that there is no common control between these facilities.

As mentioned above, the new Fort Lupton facility will be owned by Front Range. The Front Range joint venture is currently managed by a management committee comprised of a representative of Quixx Mountain and a representative of FR Holdings. Philip Smith, an employee of KN Energy, Inc., is the representative of FR Holdings on this management committee and H. Rickey Wells and Joseph Hopper are alternate representatives of FR Holdings on this management committee. None of Messrs. Smith, Wells and Hopper has any ownership interest in the existing Thermo Fort Lupton facility or is involved in the management of that facility.

Front Range intends to enter into an operating and maintenance contract with a subsidiary of General Electric Company ("GE") acting as an independent contractor. Neither GE nor any of its subsidiaries has any ownership interest in the new Front Range facility or the existing Thermo facility. Under the operating and maintenance agreement the GE subsidiary will handle the day to day operations of the new Front Range facility once construction is completed subject to the oversight of the Front Range management committee. The GE subsidiary will be responsible for operating the new Front Range facility in compliance with Front Range's various contractual and legal obligations and in accordance with budgets approved by the Front Range management committee. Ultimate authority with respect to the new Front Range facility, however, rests with the Front Range management committee.

Thermo Cogeneration, the owner of the existing Thermo facility, is managed by a management committee comprised of representatives appointed by its owners. Thermo Cogeneration has entered into a project management agreement with Thermo Project Management Inc., to provide for the operational management of the existing Thermo facility. Directly or indirectly, Thermo Project Management Inc. is 100% owned by Jay Monroe. Thermo Project Management Inc. has subcontracted day to day operations of the existing Thermo facility to an independent contractor. That independent contractor is the same GE subsidiary which will be providing operation and maintenance services for the new Front Range facility under a separate contract with Front Range. Ultimate authority with respect to the existing Thermo facility rests with the Thermo Cogeneration management committee.

I understand the State has questions regarding the personal involvement of Paul Steinway with the existing Thermo facility and the new Front Range facility. Mr. Steinway is currently a vice president of KN Power Company and FR Holdings. In such capacity, he has been actively involved in the development of the new Front Range facility. Because KN Power maintains an office in Fort Lupton, its employees will be in a position to observe operations performed by the GE subsidiary and to advise the Front Range management committee concerning such operations. It is expected that Mr. Steinway would assist in this role. Mr. Steinway is not an officer of Front Range and is not a member of the management committee of Front Range.

Prior to coming to work for KN Power Company, Mr. Steinway was employed by the Thermo organization and was actively involved with the existing Thermo facility and is knowledgeable concerning its operations. Mr. Steinway does not have any ownership interest in the existing Thermo facility. Mr. Steinway is no longer employed by the Thermo organization. He continues to have a consulting agreement with Thermo Project Management Inc., which is terminable on thirty days notice, to perform services in his areas of competence in connection with the existing Thermo facility. Those services include assisting Thermo Project Management Inc. in performing its contractual duties for the existing Thermo facility. Mr. Steinway has served as a Vice President of Thermo Project Management, Inc. and as one of the representatives on the Thermo Cogeneration management committee, but no longer holds either of those positions. In his present capacity as a consultant to Thermo Project Management, Inc., Mr. Steinway does not have any independent authority to control the management or operating decisions for the existing Thermo facility. While KN Power Company has consented to Mr. Steinway providing consulting services for the Thermo organization, those services are not performed by Mr. Steinway on behalf of KN Power, Front Range or any of the direct or indirect owners of the new Fort Lupton project.

I trust that this information will satisfy the state's concerns regarding the relationship between the new Front Range facility and the existing Thermo facility in Ft. Lupton. This information demonstrates that there is no common control between these facilities.

We are hopeful that the resolution of this issue will help to expedite the state's review and issuance of the construction permit for the new Front Range project.

Sincerely

Martha E. Rudolph
Assistant General Counsel

cc: John Cyran, AGO
Casey Shpall, AGO
Paul Steinway
Neil Maloney
Joel Howard

KN Processing, Inc.
A Subsidiary of KN Energy, Inc.
370 Van Gordon Street
P.O. Box 281304
Lakewood, CO 80228-8304
(303) 989-1740

September 7, 1999

Mr. Dennis Myers
Air Pollution Control Division
Colorado Department of Public Health and Environment
4300 Cherry Creek Dr. South
Denver, CO 80246-1530

Re: Pending Permit Application of Front Range Energy Associates, LLC

Dear Mr. Myers:

I have enclosed an Amended and Restated Limited Liability Company Agreement of Front Range Energy Associates, LLC. This agreement is provided to you for your review in order to facilitate discussions to be held on Wednesday, September 8, 1999, with respect to the Front Range permit request.

Many portions of the agreement involve definitional matters and tax driven provisions. I believe that Articles 6, 9, and 10 will be of primary assistance to you in conducting your necessary analysis and that the following sections may be of particular interest to you:

- Sections 6.1(a) and (e)
- the lead-in provision to Section 6.2(a)
- Section 6.3
- Section 6.4
- the second sentence of Section 6.5
- Section 6.6
- Section 6.8(b)
- Section 9.2(a)(8)
- Section 9.4(c)
- Sections 10.1(a) and (b)

We very much appreciate your efforts in assisting us in the prompt resolution of the issues arising with respect to the Front Range permit application and look forward to our discussions on Wednesday.

Sincerely,

Martha E. Rudolph
Assistant General Counsel

Enclosure (1)

AMENDED AND RESTATED
LIMITED LIABILITY COMPANY AGREEMENT

OF

FRONT RANGE ENERGY ASSOCIATES, LLC

TABLE OF CONTENTS

AMENDED AND RESTATED
LIMITED LIABILITY COMPANY AGREEMENT

OF

FRONT RANGE ENERGY ASSOCIATES, LLC
(A Delaware Limited Liability Company)

This Limited Liability Company Agreement of Front Range Energy Associates, LLC (the "Company") is entered into effective as of March 23, 1999 (the "**Effective Date**"), by and among **Quixx Mountain Holdings, LLC**, a Delaware limited liability company ("**QMH**"), and **FR Holdings, LLC**, a Colorado limited liability company ("**FRH**") as the Members, and FRH, in its capacity as the Manager.

RECITALS:

The Members have formed a limited liability company to develop, finance, construct, own, operate, and otherwise have a possessory interest, in an electric generating facility (the "**Project**"), and to conduct various activities associated therewith. The Project, which is more particularly described in the Power Supply Agreement, shall be an approximately 163 MW single cycle generating facility, consisting of four GE LM6000 combustion turbine generators, interconnection facilities, and associated equipment, devices, systems and facilities, and personal and real property interests, and will be constructed on property owned by the Company.

The Company will develop and construct the Project pursuant to the requirements of the Power Supply Agreement. The Company intends to enter into the Power Supply Agreement pursuant to which the Company will sell to PSCo and PSCo will purchase from the Company, electricity generated by the Project.

The Members desire to designate FRH as the Manager of the Company, and FRH has agreed to serve as the Manager, with such powers and responsibilities, and upon such terms and conditions, as are hereinafter set forth.

NOW, THEREFORE, in consideration of the mutual covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. DEFINITIONS

Capitalized terms used in this Agreement without other definition, including those contained in the Recitals, shall, unless expressly stated otherwise, have the meanings specified in this Article 1, or if not defined herein, in the Power Supply Agreement. The singular includes the plural and the masculine includes the feminine and neuter, and vice versa. "Includes" or "including" means "including, without limitation." The words "agree," "agreement," "approved," and "consent" shall be deemed to be followed by the phrase "which shall not be unreasonably withheld, conditioned or unduly delayed" except as the context may otherwise specify or require. Except to the extent expressly included in this Agreement, the definitions contained in Section 18-101 of the Act shall not apply to this Agreement.

1.1 "*Accountants*" means one or more firms of nationally recognized certified independent public accountants selected by a Majority in Interest of the Members.

1.2 "*Act*" means the DELAWARE LIMITED LIABILITY COMPANY ACT, as from time to time in effect in the State of Delaware, or any corresponding provision or provisions of any succeeding or successor law of the State of Delaware; provided, however, that any amendment to the Act, or any succeeding or successor law, is applicable to the Company only if the Company has elected to be governed by the Act as so amended or by such succeeding or successor law, as the case may be, and in such event, the term "Act" shall refer to the Act as so amended or to such succeeding or successor law only after the appropriate election by the Company, if made, has become effective.

1.3 "*Adjusted Capital Account Deficit*" means, with respect to any Member, the deficit balance, if any, in such Member's Capital Account as of the end of the relevant fiscal year, after giving effect to the following adjustments.

(a) Such Capital Account shall be deemed to be increased by any amounts which such Member is obligated to restore to the Company (pursuant to this Agreement or otherwise) or is deemed to be obligated to restore pursuant to the second to last sentence of Treasury Regulation sections 1.704-2(g)(1) and 1.704-2(i)(5) (relating to allocations attributable to nonrecourse debt).

(b) Such Capital Account shall be deemed to be decreased by the items described in Treasury Regulation sections 1.704-1(b)(2)(ii)(d)(4), (5) and (6).

The foregoing definition of Adjusted Capital Account Deficit is intended to comply with the provisions of Treasury Regulation section 1.704-1(b)(2)(ii)(d) and shall be interpreted and applied consistently therewith.

1.4 "*Affiliate*" means, when used with reference to a specified Person, any Person that directly or indirectly controls or is controlled by or is under common control

with the specified Person. For the purposes of this definition, "control" (including with correlative meanings, the terms "controlling," "controlled by" and "under common control with"), as used with respect to any Person shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities or by contract or otherwise.

1.5 "*Agreement*" means this Limited Liability Company Agreement of Front Range Energy Associates, LLC, as originally executed and as amended, modified or supplemented from time to time.

1.6 "*Appraisal*" means, unless the context indicates otherwise, a written valuation report by an Appraiser that describes and values the fair market value of an Interest in the Company, or specific Company Property, as the case may be.

1.7 "*Appraiser*" means a person or firm qualified to perform business Appraisals of limited liability companies and ownership interests in limited liability companies, or specific Company Property.

1.8 "*Article*" means an Article of this Agreement.

1.9 "*Assignee*" means the transferee pursuant to an assignment or Transfer, whereby the Assignee is not substituted as a Member in the Company. An Assignee has only the rights granted under Section 18-702(b)(2) of the Act. An Assignee or transferee does not have the right to become a Member or participate in the management, business and affairs of the Company except as provided in this Agreement.

1.10 "*Bankruptcy*" means, with respect to a Member:

(a) an adjudication that it is bankrupt or insolvent, or the entry of an order for relief under the FEDERAL BANKRUPTCY CODE or any other applicable bankruptcy or insolvency statute or law;

(b) its inability to pay its debts generally as they mature (after giving effect to the applicable grace periods);

(c) the making by it of an assignment for the benefit of creditors or the dissolution and winding up of its affairs;

(d) the filing by it of a petition in Bankruptcy or a petition for relief under any section of the FEDERAL BANKRUPTCY CODE or any other applicable Bankruptcy or insolvency statute or law or any answer or other pleading admitting or failing to deny the allegation of any such petition;

(e) the filing against it of any such petition (unless such petition is dismissed within one hundred twenty (120) days from the date of filing thereof);

(f) its seeking, consenting to, or acquiescence in the appointment of a trustee, conservator, receiver, or liquidator for it or for all or any substantial part of its assets;

(g) the appointment without its consent or acquiescence of a trustee, conservator, receiver, or liquidator for it or for all or any substantial part of its assets (unless such appointment is vacated or stayed within one hundred twenty (120) days of its effective date); or

(h) the acquisition by a creditor of a Member, or by any other Person acting on behalf of such creditor, of any rights with respect to the Member's Interest in the Company or to Profits (other than by the voluntary grant of such rights by the Member), if such acquisition shall continue for a period of one hundred twenty (120) days.

1.11 "*Book Value*" means, with respect to any asset of the Company, the asset's adjusted basis as of the relevant date for federal income tax purposes, except as follows:

(a) The initial Book Value of any asset contributed by a Member to the Company shall be the gross fair market value of such asset;

(b) The Book Values of all Company assets shall be adjusted to equal their respective gross fair market values as of the following times: (i) the acquisition of an additional interest in the Company by any new or existing Member in exchange for more than a *de minimis* Contribution; (ii) the distribution by the Company to a Member of more than a *de minimis* amount of Company assets as consideration for an interest in the Company; and (iii) the liquidation of the Company within the meaning of Treasury Regulation Section 1.704-1(b)(2)(ii)(g); provided, however, that adjustments pursuant to clauses (i) and (ii) above shall be made only if the Majority in Interest of Members determine that such adjustments are necessary or appropriate to reflect the relative economic interests of the Members in the Company;

(c) The Book Value of any Company asset distributed to any Member shall be the gross fair market value of such asset on the date of distribution; and

(d) The Book Values of Company assets shall be increased (or decreased) to reflect any adjustments to the adjusted basis of such assets pursuant to Code Section 734(b) or Code Section 743(b), but only to the extent that such adjustments are taken into account in determining capital accounts pursuant to Treasury Regulation Section 1.704-1(b)(2)(iv)(m); provided, however, that Book Values shall not be adjusted pursuant to this subsection ((d)) to the extent the Majority in Interest of Members

determine that such adjustment pursuant to subsection ((b)) hereof is necessary or appropriate in connection with a transaction that would otherwise result in an adjustment pursuant to this subsection ((d)).

If the Book Value of an asset has been determined or adjusted pursuant to subsection ((a)), ((b)) or ((d)) hereof, such Book Value shall thereafter be adjusted by the Depreciation taken into account with respect to such asset for purposes of computing Profits and Losses.

The foregoing definition of Book Value is intended to comply with the provisions of Treasury Regulation Section 1.704-1(b)(2)(iv) and shall be interpreted and applied consistently therewith. Any determinations of "gross fair market value" in this definition of Book Value shall be made by a Majority in Interest of Members.

1.12 "*Business Day*" means any day other than a Saturday, Sunday, or other day on which banks are closed in New York, New York or Denver, Colorado.

1.13 "*Capital Account*" has the meaning given to it in Section 3.1.

1.14 "*Cash Flow*" means, for any period, the amount, computed on a cash basis, of the following:

(a) the sum of (i) gross receipts, all investment income of the Company, and all cash received by the Company from other sources, and (ii) any amounts released from Reserves, reduced by:

(b) the sum of (i) disbursements of the Company in connection with the development and construction of the Project, including any payments or reimbursements to Members for development services or costs, (ii) disbursements of the Company for operating and administrative expenses (including payments under any agreements to which the Company is a party), expenditures for capital investments and reinvestments, principal payments on debt, interest and other expenses, including any debt repayments required or elected to be made in connection with any refinancing, sale or other event, and (iii) any increase in Reserves; provided that (i) the Initial Company Disbursement and (ii) any cash received, expenses incurred and disbursements made with respect to the liquidation of the Company shall not be taken into account in computing Cash Flow.

1.15 "*Closing Date*" means the date on which the Company first receives funds from the construction financing of the Project, pursuant to the Financing Documents.

1.16 "*Code*" means the Internal Revenue Code of 1986, as amended from time to time.

1.17 "*Commercial Operation Date*" has the meaning given to it in the Power Supply Agreement.

1.18 "*Company*" means the limited liability company formed under this Agreement, as initially constituted or as amended.

1.19 "*Company Documents*" means all agreements to which the Company is a party, or with respect to which the Company has approval or consent rights, including Material Contracts.

1.20 "*Conciliators*" has the meaning given to it in Section 6.7((a))(1).

1.21 "*Consent*" or "*Approval*" or "*Vote of a Person*" means the prior written consent, approval or vote of the indicated Person to the action requested. Unless otherwise provided, the Consent, Vote of Approval of the Members shall mean the Consent, Vote, or Approval of a Majority in Interest of the Members.

1.22 "*Consents*" means a consent and agreement of a Person with respect to the assignment by the Company of the Company's rights and interests under each Material Contract entered into by the Company with such Person as security pursuant to the Financing Documents.

1.23 "*Construction Contract*" means the agreement between the Company and a third-party contractor for the design and construction of the Project, as amended from time to time.

1.24 "*Construction Period Budget*" has the meaning given to it in Section 6.8(a)(1)(B).

1.25 "*Contribution*" means money and any other Property that a Member contributes to the Company in its capacity as a Member pursuant to Section 3.2 or Section 3.3.

1.26 "*Depreciation*" means for each fiscal year or part thereof, an amount equal to the depreciation, amortization, or other cost recovery deduction allowable for federal income tax purposes with respect to an asset for such year or other period, except that if the Book Value of an asset differs from its adjusted basis for federal income tax purposes at the beginning of such year, Depreciation shall be an amount which bears the same ratio to such Book Value as the federal income tax depreciation, amortization or other cost recovery deduction for such year bears to such adjusted tax basis; provided, however, if the Federal Income Tax depreciation, amortization, or other cost recovery deduction for such year is equal to zero, depreciation shall be determined with reference to such Book Value using a reasonable method selected by a Majority in Interest of Members.

1.27 "*Funding Agreement*" means the Funding Agreement to be entered into between the Company, FRH and QMH.

1.28 "*Development Period*" means the period commencing on the date established by the Unanimous Consent of Members, and terminating on the earlier to occur of the Closing Date or the date that the Project is abandoned or otherwise terminated by the Company.

1.29 "*Development Period Budget*" has the meaning given to it in Section 6.8(a)(1)(A).

1.30 "*e-prime Power Supply Agreement*" means the Power Supply Agreement to be entered into between the Company and e-prime, Inc., a Colorado corporation, as amended from time to time.

1.31 "*Effective Date*" has the meaning given to it in the introductory paragraph of this Agreement.

1.32 "*Eligible Facility*" means an "eligible facility" as defined under PUHCA.

1.33 "*Exempt Wholesale Generator*" means an "exempt wholesale generator" as defined under PUHCA.

1.34 "*FERC*" means the Federal Energy Regulatory Commission.

1.35 "*Financing Documents*" has the meaning given to it in the Power Supply Agreement.

1.36 "*GAAP*" means generally accepted accounting principles.

1.37 "*Independent Engineer*" means an independent engineering firm selected by the Members pursuant to Section 6.7((b)).

1.38 "*Initial Company Disbursement*" means the amount payable to the Company on the Closing Date pursuant to the initial disbursement schedule approved by the Senior Lender and contained in the Financing Documents, and distributable to the Members pursuant to Section 5.1 of this Agreement.

1.39 "*Interconnection Agreement*" means the Agreement to be entered into between the Company and PSCo with respect to the interconnection of the Project with PSCo's electric system, as amended from time to time.

1.40 "*Interest*" or "*Membership Interest*" means, in the context of "a Member's Interest," the entire legal and equitable ownership interest of a Member in the Company at any particular time, including, without limitation, the respective Member's interest in

the capital, income, gain, losses, deductions, expenses, and management of the Company granted by this Agreement.

1.41 "*IRS*" means the Internal Revenue Service or any successor thereto.

1.42 "*Liquidator*" has the meaning given to it in Section 11.5((b)).

1.43 "*FRH*" has the meaning given to it in the Recitals.

1.44 "*KN Energy*" means KN Energy, Inc., or KN Power Company, and their successors and subsidiaries. For purposes of this Agreement and for the avoidance of doubt, the term KN Energy also includes, following any merger, takeover, sale of a controlling interest of, or other corporate reorganization involving KN Energy, Inc. or KN Power Company, any ultimate parent of any of them, any new entity following a merger or any other successor to any of them following such a reorganization, and any subsidiary or subsidiary of a subsidiary thereof.

1.45 "*Majority In Interest of Members*" means those Members whose Sharing Ratios aggregate more than 50 percent of the Sharing Ratios of all Members.

1.46 "*Manager*" means FRH or any permitted successor to FRH as Manager of the Company.

1.47 "*Market Rate Approval*" means an order from the FERC or successor governmental authority (a) approving the Company's authority to sell electrical energy and capacity in accordance with the Power Supply Agreement; (b) waiving certain of FERC's regulations under the Federal Power Act; and (c) granting blanket approvals under certain other FERC regulations.

1.48 "*Material Contracts*" means the Company Funding Agreement, Financing Documents, Power Supply Agreement, e-prime Power Supply Agreement, Construction Contract, O&M Contract, Interconnection Agreement, Turbine Contract, and all Consents entered into with respect to any such agreement.

1.49 "*Member(s)*" means QMH and FRH, or any Person who, at the time of the reference thereto, has been admitted to the Company as a successor to the duties or interest of QMH or FRH, or as a replacement Member as provided herein, or as an additional Member, in any such Person's capacity as a Member, and in any case, only so long as such Person has not ceased to be a Member hereunder. At all times when there is only one Member, all references in this Agreement to the "Member" shall be deemed to refer to the sole Member and any and all actions requiring the Consent or Approval of all Members may be taken by the sole Member.

1.50 "*Member Indemnitee*" has the meaning given to it in Section 6.9((a)).

1.51 "*NCE*" means New Century Energies, Inc., Southwestern Public Service Company, Public Service Company of Colorado, and their successors and subsidiaries. For purposes of this Agreement and for the avoidance of doubt, the term "NCE" also includes, following any merger, takeover, sale of a controlling interest of, or other corporate reorganization involving New Century Energies, Inc., Southwestern Public Service Company, or Public Service Company of Colorado, any ultimate parent of any of them, any new entity following a merger or any other successor to any of them following such a reorganization, and any subsidiary or subsidiary of a subsidiary thereof.

1.52 "*O&M Contract*" means the contract to be entered into between the Company and a third party providing for the operation and maintenance of the Project, as amended from time to time.

1.53 "*Operating Period Budget*" has the meaning given to in Section 6.8((a))((1))((C)).

1.54 "*Permitted Member Loan*" has the meaning given to it in Section 3.3((d))((2)).

1.55 "*Person*" means any individual, limited liability company, partnership, corporation, association, business, trust, government or political subdivision thereof, governmental agency or other entity.

1.56 "*Power Supply Agreement*" means the Power Supply Agreement to be entered into between the Company, as Seller, and PSCo, as Buyer, as amended from time to time.

1.57 "*Prime Rate*" means the Prime Rate published by The Wall Street Journal in its money rate section, from time to time, which is also the base rate on corporate loans at large United States money center commercial banks. If The Wall Street Journal ceases to publish a Prime Rate, then the Prime Rate shall be the reference rate announced from time to time by a national banking association selected by the Manager. The Prime Rate shall change upon the effective date of any change in the Prime Rate by The Wall Street Journal (or its substitute), as the case may be.

1.58 "*Profits*" and "*Losses*" means, for each Year or other applicable period, the Company's taxable income or loss for such period determined in accordance with Code section 703(a) (for this purpose, all items of income, gain, loss or deduction required to be stated separately pursuant to Code section 703(a)(1) shall be included in taxable income or loss) with the following adjustments:

(a) Any income of the Company that is exempt from federal income tax, and not otherwise taken into account in computing Profits or Losses pursuant to this definition, shall be added to such taxable income or loss.

(b) Any expenditures of the Company described in Code section 705(a)(2)(B) or treated as such pursuant to Treasury Regulation section 1.704-(1)(b)(2)(iv)(i), and not otherwise taken into account in computing Profits or Losses pursuant to this definition, shall be subtracted from such taxable income or loss.

(c) Depreciation for such period shall be taken into account in lieu of the depreciation, amortization and other cost recovery deductions taken into account in computing such taxable income or loss.

(d) Gain or loss resulting from any disposition of Company Property with respect to which gain or loss is recognized for federal income tax purposes shall be computed with reference to the Book Value of the Property disposed of, rather than the adjusted tax basis of such Property.

(e) In the event the Book Value of any Company asset is adjusted pursuant to Subsection (b), (c) or (d) of the definition of Book Value set forth above in Section 1.11, the amount of such adjustment shall be taken into account as gain or loss from the disposition of such asset for the purpose of computing Profits and Losses.

(f) Such taxable income or loss shall not be deemed to include items of income, gain, loss, deduction and Code section 705(a)(2)(B) expenditures allocated pursuant to Sections 4.2((b))((1))((A)), 4.2((b))((1))((B)), 4.2((b))((1))((D)) or 4.2((b))((1))((E)) (relating to allocations caused by the occurrence of deficit Capital Account balances or the presence of nonrecourse debt).

(g) Such taxable income or loss shall not be deemed to include the Company's non-recourse deductions, within the meaning of Treasury Regulation Section 1.704-2.

1.59 "*Prohibited Utility Status*" means the status of a Person that is or may be (a) deemed by a governmental authority having jurisdiction under PUHCA to be, except as an Exempt Wholesale Generator, an "electric utility company," an "electric utility holding company," a "holding company," a "subsidiary company" of a "holding company," or an "affiliate" of a "holding company" as those terms are used in PUHCA; (b) deemed by FERC to be a "public utility," as such term is used in the Federal Power Act that is not eligible for Market Rate Approval; or (c) deemed by any comparable state or local governmental authority of appropriate jurisdiction to be any similar entity subject to regulation (or not exempt from regulation) under any other state or local regulation comparable to PUHCA or the Federal Power Act in any manner which is more adverse to the Company than the regulation under PUHCA as an Exempt Wholesale Generator and the regulation by FERC under the Market Rate Approval.

1.60 "*Project*" has the meaning set forth in the Recitals.

1.61 "*Property*" means all real property, personal property, and other assets of any nature whatsoever, which have been contributed to or acquired by the Company and all increases and decreases applicable to the Property.

1.62 "*PSCo*" means Public Service Company of Colorado, a Colorado corporation.

1.63 "*PUHCA*" means the Public Utility Holding Company Act of 1935 (15 U.S.C.A. § 79, et. seq.) and the regulations promulgated thereunder, each as amended from time to time.

1.64 "*Purchase Event*" means:

(a) For an individual Member (if permitted): Bankruptcy; death; any disabling mental or physical condition which continues for an uninterrupted period of more than six months; entry of an order adjudicating the Member incompetent by a court of competent jurisdiction; appointment of a conservator; or execution of a certificate diagnosing the Member's incompetency by a physician licensed to practice medicine in the State of the Member's residence.

(b) For a Member that is an entity: Bankruptcy and the occurrence of any of the following events, unless any such events occur pursuant to a merger or other reorganization of such Member:

(1) filing of a certificate of dissolution or its equivalent for any corporation;

(2) dissolution of a partnership or limited liability company, if the entity is to be wound up and liquidated and not continued;

(3) termination of a trust;

(4) the dissolution and termination of any other entity that is a Member, whether voluntary or involuntary.

1.65 "*Purchase Option member*" has the meaning given to it in Section 9.6.

1.66 "*Purpose* or *Purposes*" has the meaning given to it in Section 2.5.

1.67 "*QMH*" has the meaning given to it in the Recitals.

1.68 "*Regulatory Allocations*" has the meaning given to it in Section 4.2((b))((1))((F)).

1.69 "*Reserves*" means the reserves established and maintained from time to time for current and future operating and working capital and to pay taxes, insurance, debt service, debt amortization, repairs, replacements or renewals, or other costs and expenses incident to the Company's business, or for any other Company Purposes, including reserves for capital expenditures and unforeseen or contingent liabilities, debts or obligations.

1.70 "*Section*" means a section of this Agreement, unless the context requires otherwise.

1.71 "*Selling Member*" has the meaning given to it in Section 9.4.

1.72 "*Sharing Ratio*" means the amount (expressed as a percentage) which shall be utilized to measure certain aspects of a Member's Interest in the Company. The Members' initial respective Sharing Ratios are specified in Schedule A and incorporated herein by this reference.

1.73 "*Tax Matters Member*" has the meaning set forth in Section 7.6((d)).

1.74 "*Transfer*" means, in the context of a "Transfer of" an Interest, a sale, assignment, gift, transfer, hypothecation, pledge or other disposition (whether as security or otherwise) of all or part of such Interest. The transferee of an Interest, pursuant to a permitted Transfer, shall have the status only of an Assignee, unless made a substituted Member in accordance with the terms and conditions of this Agreement; provided, however, that a pledge, hypothecation, mortgage or collateral assignment by any of the Members of their respective Membership Interests to a Senior Lender shall not be deemed to be a transfer; provided further, however, that the foreclosure or realization on such Membership Interests by such Senior Lender would be deemed to be a "Transfer." For purposes hereof, a sale, assignment, gift, transfer, hypothecation, pledge, or other disposition of any ownership interest in a Member, the addition of additional equity owners of a Member or the amendment of any of the organizational documents of a Member shall not be deemed to constitute a transfer of the Interest of such Member.

1.75 "*Treasury Regulations*" means the regulations issued by the Treasury Department pursuant to the Code.

1.76 "*Turbine Contract*" means the contract to be entered into between Front Range Energy Associates, LLC, as Buyer, and General Electric Company, or one or more of its affiliates, as Seller, as amended from time to time.

1.77 "*Unanimous Consent*" or "*Unanimous Consent of Members*" means the Consent of all Members.

1.78 "*Year*" means the calendar year or such other fiscal period for the Company as is selected pursuant to Section 7.1.

2. FORMATION AND BUSINESS OF THE COMPANY

2.1 **Formation.** The Members have formed this Company in accordance with the provisions of this Agreement and pursuant to the Act.

2.2 **Name.** The name of the Company is Front Range Energy Associates, LLC The name of the Company may be changed by a Majority in Interest of the Members.

2.3 **Existence and Term.** The Company's existence commenced as of the date the Company's Certificate of Formation was filed in accordance with the Act. The Company shall continue, unless earlier dissolved in accordance with the provisions of Article 11, until the later to occur of (a) the termination of the Power Supply Agreement, the e-prime Power Supply Agreement, and any substitute or additional power supply agreements, or any extensions or renewals thereof, or (b) the cessation of the Company to own or operate the Project for a commercial purpose.

2.4 **Place of Business.** The principal office and place of business of the Company may be established from time to time by a Majority in Interest of the Members. The Company shall maintain a registered office in Delaware to the extent required by the Act.

2.5 **Purposes.** The purposes for which the Company is organized are:

(a) **General.** To (i) develop, finance and refinance, construct, own, operate, and maintain the Project, (ii) generate, deliver and sell electricity from the Project, and (iii) lease, sell, dispose of and otherwise deal with the Project and any other Company Property.

(b) **Incidental Activities.** To do any and all things and perform any and all acts incidental to, necessary, appropriate or advisable in connection with the foregoing.

2.6 **Other Activities of the Members.** The Members, the Manager, and their Affiliates may at any time and from time to time engage in and possess interests in other business ventures and activities of any and every type and description, independently or with others, whether such ventures are competitive with the Company or the Project. Neither the Manager, the Company nor any other Member shall by virtue of this Agreement have any right, title, or interest in or to such independent ventures and activities or to the income or profits derived therefrom, nor shall engaging in such ventures and activities constitute a breach of its obligations hereunder. The Members, the

Manager and their officers and directors, shall not be obligated to devote their entire efforts to the business of the Company.

2.7 **Filings.** The Manager shall cause the Company to take any actions and file any documents and instruments reasonably necessary to perfect and maintain the Company as a limited liability company. Further, the Manager shall cause to be executed, filed and published all certificates, notices, statements or other instruments and amendments thereto under the laws of the State of Delaware and other applicable jurisdictions as are necessary or advisable for the operation of the Company and the limited liability status of each Member.

2.8 **No Creation of State Law Partnership.** Except for federal and state tax purposes, and only for such purposes, the Members intend that the Company not be treated as or construed as a partnership, and that no Member be considered to be a partner of any other Member, and this Agreement is not to be otherwise construed. It is further the intention of the Members that the debts, obligations, and liabilities of the Company, whether arising in contract, tort, or otherwise, are solely the debts, obligations and liabilities of the Company; and no Member of the Company is personally obligated for a debt, obligation, or liability of the Company solely by reason of being a Member.

3. CAPITALIZATION

3.1 **Capital Accounts.**

(a) **Establishment.** A separate capital account ("**Capital Account**") shall be maintained for each Member.

(b) **Capital Account Balances.** The opening Capital Account balance of each Member shall be equal to the amount for such Member set forth in Section 3.2, and such Capital Account shall thereafter be further adjusted with respect to subsequent events as follows:

(1) *increased by*:

(A) the aggregate amount of such Member's cash Contributions to the Company;

(B) the Book Value of Property contributed by such Member to the Company, net of liabilities secured by such Property that the Company is considered to assume or take subject to under Code Section 752;

(C) Profits and items of income and gain allocated to such Member pursuant to Section 4.2;

(D) The amount of any liabilities of the Company which are considered to be assumed by such Member for purposes of Treasury Regulation Section 1.704-1(b) and which are not otherwise taken into account under this Section 3.1((b)); and

(E) any positive adjustment to such Member's Capital Account by reason of an adjustment to the Book Value of the Company assets pursuant to Section 3.1((c))((1)); and

(2) *decreased by:*

(A) cash distributions to such Member from the Company;

(B) the Book Value of Property distributed in kind to such Member, net of liabilities secured by such Property that such Member is deemed to assume or take subject to under Code Section 752;

(C) Losses and items of loss or deductions allocated to such Member pursuant to Section 4.2;

(D) The amount of any liabilities of such Member which are considered as assumed by the Company for purposes of Treasury Regulation Section 1.704-(1)(b) and which are not otherwise taken into account pursuant to this Section 3.1((b)); and

(E) any negative adjustment to such Member's Capital Account by reason of an adjustment to the Book Value of Company assets pursuant to Section 3.1((c))((1)).

(c) **Special Rules.**

(1) *Adjustment for Change in Book Value.* If the Book Values of Company assets are adjusted, as provided in the definition of Book Value in Section 1.11, the Capital Accounts of all Members shall be adjusted simultaneously to reflect the aggregate net adjustment as if the Company recognized gain or loss equal to the amount of such aggregate net adjustment and such gain or loss were allocated to the Members in the manner required by Section 4.2.

(2) *Intent to Comply with Treasury Regulations.* This Section 3.1 and the other provisions of this Agreement relating to the maintenance of Capital Accounts are intended to comply with Treasury Regulation Section 1.704-1(b), and shall be interpreted and applied in a manner consistent with such regulations. To the extent such provisions are inconsistent with such regulations or are incomplete with respect thereto, the Capital Accounts of the Members shall be maintained in accordance with such regulations.

3.2 **Mandatory Capital Contributions and Capital Accounts.**

(a) **Members.** The Members have made, or agree to make, as indicated on Schedule A, the Contributions described on Schedule A.

3.3 **Subsequent Capital Contributions, Loans and Withdrawals of Capital.**

(a) **General.** Except as provided in Section 3.3((b)), and except to the extent that Section 18-6.07(b) of the Act provides otherwise, no Person may require any Member to make any additional Contributions to the Company. The Manager may ask (but may not require) the Members to make additional Contributions for any Company Purpose, and each Member may make the additional Contributions with the Unanimous Consent of the Members, but only if all Members are given the opportunity to make Contributions in proportion to their Sharing Ratios. The Capital Accounts of the Members making additional Contributions will be credited in the respective amounts of such Contributions, and the Sharing Ratios of the Members shall be immediately and appropriately adjusted to reflect any such additional Contributions.

(b) **Mandatory Additional Capital Contributions.** Each Member shall make additional Contributions to the Company as and when required pursuant to the terms of the Funding Agreement, and Capital Contributions Approved by the Manager and the Members, by Unanimous Consent.

(c) **Amendment of Schedule A.** Schedule A shall be amended from time to time, as appropriate, by the Manager, to reflect additional Contributions of the Members, changes in the Members' Sharing Ratios, and the admission of additional Members to the Company.

(d) **Loans.**

(1) **General Rule.** No Member shall be required to lend or advance any money to or for the benefit of the Company.

(2) **Permitted Loans.** If (A) the Company's funds are insufficient to meet its operating costs, expenses, obligations or liabilities, and (B) the necessary financing is not reasonably obtainable from third parties in amounts or on terms which are satisfactory to the Manager, the Members may, at the request of the Manager (but shall be under no obligation to) lend all or a portion of the amount of needed funds to the Company on either a long-term or short-term basis (a "**Permitted Member Loan**"). If more than one Member desires to loan or advance funds to the Company pursuant to this Section 3.3((d))((2)), each such Member shall be entitled to provide to the Company such proportion of the necessary funds as such Member's Sharing Ratio bears to the Sharing Ratios of the other Members who desire to participate. Any such loans shall (V) be unsecured, (W) provide for repayments to be applied first to

accrued interest and then to principal, (X) provide for repayment at the earliest possible time solely out of funds available for distribution pursuant to the terms of this Agreement and prior to any distributions to the Members, and (Y) bear interest at a rate equal to the Prime Rate plus two percent (2%) (which rate of interest shall in any event not be in excess of the maximum rate permitted by applicable law).

3.4 **No Interest on Capital Account Balances.** No Member shall be entitled to receive any interest on the balance in its Capital Account.

3.5 **Return of Capital Contribution.** Except as specifically provided in this Agreement, no Member has the right to require the return of all or any part of its Contribution or Capital Account balance, or to require a distribution of any Property from the Company prior to the termination and liquidation of the Company.

4. PROFITS AND LOSSES

4.1 **Introduction.** Article 4 generally sets forth the rules for book and tax allocations to the Members. Section 4.2 sets forth the allocations of "book" Profits, Losses and similar items, determined in accordance with the method of accounting set forth in Section 7.2 (which is based on federal income tax principles as adjusted by the partnership allocation rules set forth in Treasury Regulation Section 1.704-1(b), rather than GAAP). Section 4.3 sets forth the manner in which items of income, gain, loss, deduction, credits and basis therefor will be allocated to the Members for income tax purposes to the extent such items may be allocated differently from the book allocations.

4.2 **Book Allocations.** Section 4.2((a)) sets forth the general rule for book allocations to the Members. Section 4.2((b)) sets forth various special rules which modify or clarify the general rules of Section 4.2((a)).

(a) **General Rule.** Profits and Losses of the Company shall be allocated to the Members in accordance with their respective Sharing Ratios.

(b) **Special Rules.** Notwithstanding the general allocation rule set forth in Section 4.2((a)), the following special allocation rules shall apply under the circumstances described therein.

(1) *Deficit Capital Account and Nonrecourse Debt Rules.* The special rules in this Section 4.2((b))((1)) apply, in the following order, to take into account the possibility of Members having deficit Capital Account balances for which they are not economically responsible and the effect of the Company or any partnership in which the Company is a partner incurring nonrecourse debt.

(A) Company Minimum Gain Chargeback. If there is a net decrease in partnership minimum gain during any Year, determined in accordance with

the tiered partnership rules of Treasury Regulation Section 1.704-2(k), each Member shall be allocated items of income and gain for such Year (and if necessary, subsequent Years), in proportion to, and to the extent of, an amount equal to such Member's share of the net decrease in partnership minimum gain within the meaning of Treasury Regulation Section 1.704-2(g)(2), except to the extent not required by Treasury Regulation Section 1.704-2(f). To the extent that this Section 4.2((b))((1))((A)) is inconsistent with Treasury Regulation Sections 1.704-2(f) or 1.704-2(k) or incomplete with respect to such regulations, the minimum gain chargeback provided for herein shall be applied and interpreted in accordance with such regulations.

(B) Member Minimum Gain Chargeback. If there is a net decrease in partner nonrecourse debt minimum gain attributable to a partner nonrecourse debt during any Year, within the meaning of Treasury Regulation Section 1.704-2(i)(2), each Member who has a share of the partner nonrecourse debt minimum gain attributable to such partner nonrecourse debt, determined in accordance with Treasury Regulation Section 1.704-2(i)(5), shall be allocated items of income and gain for such Year (and, if necessary, subsequent Years) in proportion to, and to the extent of an amount equal to such Member's share of the net decrease in partner nonrecourse debt minimum gain. To the extent that this Section 4.2((b))((1))((B)) is inconsistent with Treasury Regulation Section 1.704-2(i) or 1.704-2(k) or incomplete with respect to such regulations, the partner nonrecourse debt minimum gain chargeback provided for herein shall be applied and interpreted in accordance with such regulations.

(C) Limitation on Loss Allocations. The Losses allocated to any Member pursuant to Section 4.2((a)) with respect to any Year shall not exceed the maximum amount of Losses that can be so allocated without causing such Member to have an Adjusted Capital Account Deficit at the end of such Year. All Losses in excess of the limitation set forth in this Section 4.2((b))((1))((C)) shall be allocated first, to those Members who are not subject to this limitation, in proportion to their Sharing Ratios with respect to the applicable period or event giving rise to the Losses, (but losses shall not be allocated to a Member to the extent that such allocation would cause such Member to have an Adjusted Capital Account Deficit) and second, any remaining amount to the Members in the manner required by the Code and Treasury Regulations.

(D) Deficit Account Chargeback and Qualified Income Offset. If any Member has an Adjusted Capital Account Deficit at the end of any Year, including an Adjusted Capital Account Deficit for such Member caused or increased by an adjustment, allocation or distribution described in Treasury Regulation Sections 1.704-1(b)(2)(ii)(d)(4), (5) or (6), such Member shall be allocated items of income and gain (consisting of a pro rata portion of each item of Company income, including gross income and gain) in an amount and manner sufficient to eliminate such Adjusted Capital Account Deficit as quickly as possible.

(E) Member Nonrecourse Deductions. Any partner nonrecourse deductions for any Year or other period shall be allocated to the Member who bears the economic risk of loss with respect to the partner nonrecourse debt to which such partner nonrecourse deductions are attributable in accordance with Treasury Regulation Sections 1.704-2(i) and 1.704-2(k).

(F) Curative Allocations. The allocations provided for in Section 4.2((b))((1))((A)), 4.2((b))((1))((B)), 4.2((b))((1))((C)), 4.2((b))((1))((D)) and 4.2((b))((1))((E)) above (the "**Regulatory Allocations**") are intended to comply with certain requirements of Treasury Regulations Sections 1.704-1 and 1.704-2, and may not be consistent with the manner in which the Members intend to divide Company Profits, Losses and similar items. Accordingly, to the extent necessary (after taking into account anticipated reversing Regulatory Allocations) Profits, Losses and other items will be reallocated among the Members (in the same Year, and to the extent necessary, subsequent Years) in a manner consistent with Treasury Regulation Sections 1.704-1(b) and 1.704-2 so as to prevent the Regulatory Allocations from distorting the manner in which Company Profits, Losses and other items are intended to be allocated among the Members pursuant to Section 4.2((a)).

(G) Change in Regulations. If the Treasury Regulations incorporating the Regulatory Allocations are hereafter changed or if new Treasury Regulations are hereafter adopted, and such change or new regulations, in the opinion of independent recognized tax counsel for the Company, make it necessary to revise the Regulatory Allocations or provide further special allocation rules in order to avoid a significant risk that a material portion of any allocation set forth in this Article 4 would not be respected for federal income tax purposes, this Agreement shall be amended (with the Consent of a Majority in Interest of the Members, which consent shall not be unreasonably withheld) in such a manner as, in the opinion of such counsel, is necessary or desirable, taking into account the interests of the Members as a whole and all other relevant factors, to avoid or reduce significantly such risk to the extent possible without materially changing the amounts distributable to any Member pursuant to this Agreement.

(2) *Change in Members' Interests.* If there is a change in any Member's share of the Company's Profits, Losses or other items during any Year, allocations among the Members shall be made in accordance with their Interests in the Company from time to time during such Year in accordance with Code Section 706, using the closing-of-the-books method, except that Depreciation, amortization and similar items shall be deemed to accrue ratably on a daily basis over the entire Year during which the corresponding asset is owned by the Company for the entire Year, and over the portion of a Year after such asset is placed in service by the Company if such asset is placed in service during the Year.

(3) *Nonrecourse Debt Sharing.* For purposes of this Agreement, the Members shall be deemed to be allocated each Year nonrecourse deductions, within the meaning of Treasury Regulation Section 1.704-2, in proportion to their Sharing Ratios. Solely for the purpose of determining a Member's proportionate share of the "excess nonrecourse liabilities" of the Company within the meaning of Treasury Regulation Section 1.752-3(a)(3), the Members' interests in Company Profits are their Sharing Ratios.

4.3 **Tax Allocations.**

(a) **Generally.** Except as set forth in Section 4.3((b)), allocations for tax purposes of items of income, gain, loss and deduction, and credits and basis therefor, shall be made in the same manner as allocations for book purposes as set forth in Section 4.2. Allocations pursuant to this Section 4.3 are solely for purposes of federal, state and local income taxes and shall not affect, or in any way be taken into account in computing, any Member's Capital Account or share of Profits, Losses, other items or distributions pursuant to any provision of this Agreement.

(b) **Special Rules.**

(1) *Elimination of Book/Tax Disparities.* If any Company Property has a Book Value different than its adjusted tax basis to the Company for federal income tax purposes (whether by reason of the Contribution of such property to the Company, the revaluation of such property hereunder, or otherwise), allocations of taxable income, gain, loss and deduction under this Section 4.3 with respect to such asset shall take account of any variation between the adjusted tax basis of such asset for federal income tax purposes and its Book Value in the manner prescribed by Code Section 704(c) and Treasury Regulation Section 1.704-3(c).

(2) *Allocation of Items Among Members.* Each item of income, gain, loss, deduction and credit and all other items governed by Code Section 702(a) shall be allocated among the Members in proportion to the allocation of Profits, Losses and other items to such Members hereunder, provided that any gain recognized from any disposition of a Company asset which is treated as ordinary income because it is attributable to the recapture of any Depreciation or amortization shall be allocated among the Members in the same ratio as the prior allocations of Profits, Losses or other items which included such Depreciation or amortization, but not in excess of the gain otherwise allocable to each Member.

(c) **State and Local Items.** Items of income, gain, loss, deduction, credit and tax preference for state and local income tax purposes shall be allocated to and among the Members in a manner consistent with the allocation of such items for federal income tax purposes in accordance with the foregoing provisions of this Article 4.

(d) **Conformity of Reporting.** The Members are aware of the income tax consequences of the allocations made by this Section 4.3 and hereby agree to be bound by the provisions of this Section 4.3 in reporting their shares of Company income, gain, loss, deduction, credits and other items for income tax purposes, except in the case of manifest error.

5. DISTRIBUTIONS

5.1 **Distribution of Initial Company Disbursement.** The Initial Company Disbursement (other than any accountable reimbursements approved by the Unanimous Consent of Members and included within such disbursement) shall be distributed immediately upon receipt thereof, 50% to QMH and 50% to FRH. Any accountable reimbursements to a Member on the Closing Date shall be distributed immediately upon receipt thereof from the Initial Company Disbursement to the Members who incurred the accountable expenses in the amounts that such expenses were borne by such Members.

5.2 **Distributions of Cash Flow.** Subject to any applicable restrictions imposed upon distributions contained in the Financing Documents, or by the Unanimous Consent of Members, the Manager shall make distributions of Cash Flow to the Members no later than forty-five (45) days after the end of each calendar quarter, and otherwise as soon as available for distribution. All such distributions of Cash Flow shall be made to the Members in accordance with their respective Sharing Ratios.

5.3 **Liquidating Distributions.** Distributions to the Members of cash or other Property arising from a liquidation of the Company shall be made in accordance with the Capital Account balances of the Members, as provided in Section 11.5((d))((2)).

5.4 **Distributions in Kind.** Property of the Company may be distributed in kind only with the Unanimous Consent of the Members, and in any event only upon liquidation of the Company. If any Property of the Company is distributed in kind, the Company shall make such distributions in kind pursuant to Section 1.704-(1)(b)(2)(iv)(e)(1) of the Treasury Regulations in the following manner:

(a) An Appraisal of the value of such Property shall be made by an Appraiser, and the Property shall be treated as sold for its fair market value, as determined by the Appraiser. The Capital Accounts of the Members shall be adjusted to reflect any Profits or Losses which would have been realized if the Property had actually been sold for its Appraisal value, and the cash sales proceeds received and distributed; and

(b) The Property shall be distributed to the Members entitled thereto as tenants-in-common in the same proportions in which such Members would have been entitled to under Section 11.5((d))((2)), with respect to liquidating distributions.

5.5 **Withholding.** The Manager is authorized to withhold from distributions to a Member, or with respect to allocations to a Member, and to pay over to a federal, state or local government, any amounts required to be withheld pursuant to the Code or any provisions of any other federal, state or local law. Any amounts so withheld shall be treated as distributed to such Member pursuant to this Article 5 for all purposes of this Agreement, and shall be offset against the net amounts otherwise distributable to such Member. The Manager may also withhold from distributions that would otherwise be made to a Member, and applied to the obligations of such Member, any amounts that such Member owes to the Company.

5.6 **Limitations: No Priority in Distributions.** No Member shall be entitled to demand and receive property other than cash in return for its Contribution to the Company. In addition, except as otherwise specifically provided in this Agreement, no Member shall have any priority over any other Member as to any Company distributions or as to the return of its Contributions.

6. MANAGEMENT OF COMPANY: AUTHORITY OF MANAGER

6.1 **Authority and Responsibility of Manager.** The Company hereby designates FRH as the Manager. The Company has only one Manager. Except as expressly provided in this Agreement, and subject at all times to the Purposes of the Company, the Manager shall have the authority and responsibility to administer and conduct the business of the Company. Without limiting the generality of the foregoing, the Manager has the authority to do on behalf of the Company all things which are necessary, proper or desirable to carry out its duties and responsibilities with respect to the business of the Company, including, without limitation, the right, power and authority from time to time to do the following:

(a) **Project Management.** Manage and coordinate the development, construction and operation of the Project In accordance with the Company Documents, the Company Budgets, and applicable law, including but not limited to the Company's air permit, and other permits and approvals, rules, and regulations, related to pollution and protection of the environment, and to enforce and perform the obligations and exercise the rights of the Company under the Company Documents.

(b) **Payments and Collections.** Cause to be paid all amounts due and payable by the Company to any Person and to collect all amounts due to the Company.

(c) **Borrowing Funds.** Borrow money from banks and other lending institutions and lenders for any Company Purpose, including borrowing funds from the Senior Lender pursuant to the Financing Documents, and in conjunction therewith, draw, make, execute, and issue promissory notes or other negotiable or non-negotiable instruments, debentures, debt securities, and other evidences of indebtedness, and mortgage, pledge, encumber, assign in trust, and grant security interests in the assets of

the Company to secure payment of the borrowed sums, obtain replacements of any mortgage, deed of trust, or other security device, and prepay in whole or in part, refinance, increase, modify, consolidate, or extend any promissory note, debt instrument, or other evidence of indebtedness, mortgage, deed of trust, or other security device, and engage in any other means of financing.

(d) **Accounts.** Open accounts and deposit and maintain funds in the name of the Company.

(e) **Dealing with Properties.** Acquire, hold, develop, construct, own, manage, improve, operate, repair, lease as lessor or lessee, sell, transfer, exchange, dispose or otherwise deal with the Project and real or personal property of any nature whatsoever as may be necessary or advisable for the operation of the Company, including engaging in the activities contemplated in the O&M Agreement, Construction Contract, Power Supply Agreement and the e-prime Power Supply Agreement.

(f) **Independent Contractors, Employees and Agents.** Contract with, delegate duties to, and employ from time to time, any Persons necessary or advisable for the management, operation, and ownership of the Company's business, including operators, managerial and clerical help, agents, Accountants, attorneys, insurance brokers, consultants, engineers, architects, construction contractors, and other Persons necessary, desirable, or appropriate to carry out the business and affairs of the Company, and cause the Company to pay appropriate fees, expenses and other compensation to such Persons.

(g) **Prosecution and Settlement.** Pay, extend, renew, modify, adjust, submit to arbitration, prosecute, sue upon, defend or compromise, upon such terms as the Manager may reasonably determine and upon such evidence as the Manager may reasonably deem sufficient, any obligation, suit, liability, cause of action or claim, either in favor of or against the Company.

(h) **Contracts.** Enter into, execute, acknowledge, deliver, and prepay, modify, or extend any and all contracts, agreements, instruments, conveyances, leases, or other instruments necessary or appropriate to carry out the Purposes of the Company, including the Company Documents.

(i) **Reserves.** Establish and maintain Reserves.

(j) **Non-Recourse Indebtedness.** Require in any obligations of the Company that the Members shall not have any personal liability thereon but that the Person contracting with the Company is to look solely to the Company and its assets for satisfaction.

(k) **Investment of Company Funds.** Invest and reinvest Company Property to accomplish Company Purposes.

(l) **Insurance.** Determine and acquire the types and amounts of insurance coverages required by and for the Company Purposes, Property, and/or business.

(m) **Administration.** Perform all other obligations provided elsewhere in this Agreement to be performed by the Members.

6.2 **Restrictions on Authority of Manager.**

(a) **Actions Requiring the Consent of a Majority in Interest of Members.** The following actions with respect to the Company or the exercise of the Company's rights under the Company Documents shall, subject to the provisions of Sections 6.5 and 6.9(b), and other provisions prohibiting QMH from Voting on matters relating to emission control measures) require the Approval of a Majority in Interest of Members.

(1) Approving or adopting the annual Company Budgets, and any material amendments or modifications thereto.

(2) Making or approving expenditures relating to the Company Documents, if any such expenditure, or series of related expenditures, is not provided for in the applicable Company, Company Budget, or Company Document, and involves making a payment or concerns a monetary value in excess of $50,000.00.

(3) Causing the Company to enter into the Material Contracts.

(4) Amending, modifying, or terminating a Material Contract, or causing the Company to enter into a Company Document, if such action involves making payments or concerns a monetary value in excess of $50,000.00.

(5) Entering into or consenting to, on behalf of the Company, a settlement, judgment, or consent order with respect to litigation, arbitration, or a proceeding (including governmental investigations, governmental proceedings, or proceedings involving the imposition of a fine or penalty) any of which involves payments or concerns a monetary value in excess of $50,000.00.

(6) Pledging, mortgaging, or otherwise creating liens upon or encumbering Company Property, or borrowing money or entering into a loan agreement, deferred purchase agreement, lease, or other financing arrangement, if any such action involves an expenditure of, or concerns a monetary value in excess of $50,000.00, except (A) trade payables incurred in the ordinary course of business and contemplated under the

applicable Company Budget, (B) Permitted Loans, and (C) actions taken pursuant to and in compliance with the express provisions of the Financing Documents.

(7) Making any Company election for federal, state or local income tax purposes.

(8) Changing the accounting method or methods used by the Company.

(9) **Disposition of Assets.** Prior to the actual termination of the Company, selling or otherwise disposing of all or substantially all of the assets of the Company.

(10) **Dissolution.** Dissolution and liquidation of the Company in accordance with Article 11.

(11) **Continuation.** Continuation of the business of the Company in accordance with Section 11.4.

(b) **Actions Requiring the Unanimous Consent of the Members.**

(1) **Act in violation of Agreement.** Engaging in any act in violation of this Agreement.

(2) **Company Property.** Possessing Company Property or assigning the rights of the Company or its Members in specific Company Property for other than a Company Purpose.

(3) **Assignments for Benefit of Creditors.** Making, executing, or delivering any assignments for the benefit of creditors or on the assignee's promise to pay the debts of the Company.

(4) **Changing the Purpose of the Company.** Changing the nature of the Company's business from that described in Section 2.5 or engaging in any act that would make it impossible to carry on the ordinary business of the Company.

(5) **Bankruptcy.** Filing any petition for the Company under the federal Bankruptcy Act, or seeking protection under any other federal or state Bankruptcy or insolvency law or debtor relief statute, or consenting to or acquiescing in the filing of any such petition or the seeking of any such protection.

6.3 **Contracts with Interested Parties.** Notwithstanding anything in this Agreement to the contrary, a Member may not vote as a Member, or act as Manager, with respect to any decision, contract or matter in which the Member or any of its Affiliates (excluding the Company for this purpose) possesses a financial interest. In this respect, if

it is proposed that a Member or an Affiliate of a Member provide goods or services to the Company or purchase goods or services from the Company, the Manager, if the Manager is disinterested in the transaction, or if there is no disinterested Manager, the disinterested Member, or if there is no disinterested Member, a disinterested Person, which is not an Affiliate of the Interested Member, appointed by a Majority in Interest of Members, shall represent the Company in the negotiation and administration of such arrangements (including the resolution of disputes).

6.4 **Company Actions Involving the Implementation of Emission Controls.** Notwithstanding anything in this Agreement to the contrary, FRH, or its Transferee, whether in its capacity as Manager or a Member, shall have the sole and irrevocable right to, and is hereby authorized and empowered, during the life of the Project, to Vote upon and make all decisions and take all actions of every nature whatsoever, with respect to the implementation of emission control measures. By way of illustration, and not by way of limitation, FRH, or its permitted Transferee, shall have the sole right to Vote upon and make decisions on behalf of the Company concerning emission controls during the construction phase of the Project (including decisions under the Construction Contract, and specifically including the Approval of change order requests regarding emission controls), and during the operational phase of the Project (including decisions under the O&M Contract, the Power Supply Agreement, and the e-prime Power Supply Agreement relating to the implementation of emission controls), and the sole right to Vote upon and approve items in the Company Budgets relating to emission controls and the implementation thereof. If, for any reason, FRH ceases to be the Manager hereunder, then the rights granted to FRH hereunder shall be granted to the successor Manager, or if there is no successor Manager, to the Members which are not Affiliates of QMH, e-prime, Public Service Company of Colorado, or New Century Energies, Inc. If, in the unlikely event, because of operation of law, or other reason, QMH becomes the only Member of the Company, then QMH shall take such actions as are reasonably required in order to cause the admission of an additional Member, and the designation of such additional Member as Manager of the Company, and until such time as such successor Manager is admitted to the Company, any decisions regarding the implementation of emissions controls shall be made by the Independent Engineer designated pursuant to the Financing Documents. FRH may not delegate its obligations under this Section 6.4 to QMH, or any Person that is an Affiliate of QMH.

6.5 **Officers of Company.** The Manager may, in its discretion, from time to time designate one or more Persons to be officers of the Company. Officers are not required to be Members of the Company, nor residents of any particular state. Any such officer so elected by the Manager shall, subject to the provisions of Sections 6.4 and 6.8((b)), and other provisions of this Agreement prohibiting QMH from Voting upon matters relating to emission control measures, perform such duties and exercise such authority as may from time to time be designated by the Manager. In the discretion of the Manager, the same Person may hold one or more offices of the Company. Each officer

will hold office until the officer's successor has been duly elected and qualified. Any officer of the Company is subject to removal, with or without cause, by the Manager. Any vacancy in the position of an officer of the Company resulting from a removal, resignation or other event may be filled by the Manager. The removal of an officer is without prejudice to the contract rights, if any, of the person removed. Designation of an officer does not of itself create contract rights. No compensation shall be paid to the officers of the Company. The officers of the Company may include a Chairman, Vice Chairman, Secretary and Treasurer. The Manager may also designate one or more Assistant Secretaries and Assistant Treasurers.

(a) **Appointment and Removal.**

(b) **Description of Offices.** The duties and obligations of the Chairman, Vice Chairman, Secretary and Treasurer shall be as follows:

(1) **Chairman.** The Chairman shall preside at all meetings of the Members and shall have such power and authority as may be from time to time conferred upon him by the Manager. He may sign on behalf of the Company any contracts, agreements, bonds and mortgages and any applications or other documents which the Manager or the Members, as applicable, have authorized to be signed on behalf of the Company and shall endeavor to see that all orders, directives and policies of the Company are carried out.

(2) **Vice Chairman.** In the absence of the Chairman or in the event of its inability or refusal to act, the Vice Chairman shall perform the duties of the Chairman, and when so acting shall have the powers of and be subject to all restrictions imposed upon the Chairman. The Vice Chairman shall also perform such other duties as the Manager may from time to time prescribe.

(3) **Secretary.** The Secretary shall attend all meetings of the Manager and, if so directed, record, or cause to be recorded, all proceedings of the meetings in a book to be kept for that purpose. If requested, he shall give, or cause to be given, notice of all special meetings of the Members. The Secretary shall also perform such other duties as the Manager may from time to time prescribe.

(4) **Treasurer.** The Treasurer shall be responsible for advising the Manager concerning the custody and utilization of the Company's funds and securities and records with respect thereto. The Treasurer shall also perform such other duties as the Manager may from time to time prescribe.

6.6 **Delegation of Authority.** The Manager may, subject to Section 6.4, from time to time delegate to third persons on terms and conditions deemed necessary and appropriate by the Manager, in its sole discretion, rights and authority with respect to the administration and control of the day-to-day operations of the Company.

6.7 **Dispute Resolution.**

(a) **Resolution by Conciliators.** If any material controversy between the Members arises with respect to the Company's purposes or business, including the terms of this Agreement, and such controversy cannot be settled by mutual accord, any Member may seek to have the dispute resolved in accordance with the following procedures:

(1) Any Member may refer the disagreement to the Chief Executive Officer or equivalent of both of the Members (the "**Conciliators**"). The Member submitting the dispute shall simultaneously give notice to the other Member(s) of such submission. The Conciliators shall negotiate in good faith regarding the subject of disagreement.

(2) The procedure for resolving such dispute shall in each instance be determined by the Conciliators, and the same procedure need not be followed for different disputes. The Members hereby confirm their understanding that the type of dispute involved and the extent of the need for urgency will determine the procedure to be followed in each instance. The Conciliators shall afford each Member, and any representative designated by such Member, an opportunity to present such Member's views, although the Conciliators need not hold formal hearings. If the Conciliators determine, after good faith negotiations, that they are unable to resolve the dispute, or if the dispute is not resolved within thirty (30) days after it is referred to the Conciliators, then they shall immediately give written notice of the failure to resolve the dispute to each Member.

(b) **Resolution by Independent Engineer.** If a material controversy or claim is not settled in accordance with the procedures set forth in Section 6.7((a)), and the matter in dispute involves any matter(s) primarily requiring the exercise of engineering judgment, then at the request of a Member made within twenty (20) days following the notice provided for in Section 6.7((a))((2)) stating that the Conciliators are unable to resolve the dispute, the dispute shall immediately be brought to the Independent Engineer, in accordance with the following procedures:

(1) The Independent Engineer shall be required to make a final determination, not subject to appeal, as soon as possible and in any event within thirty (30) days from the receipt of such dispute by the Independent Engineer. The parties agree to be bound by the terms of the Independent Engineer's final determination. The determination by the Independent Engineer shall be made in writing and shall contain written findings of fact on which its decision is based, and shall be specifically enforceable by a court of competent jurisdiction. The costs associated with the resolution of any matter by the Independent Engineer shall be borne by the Company.

(2) The Independent Engineer, and any successor Independent Engineer, shall be mutually selected by the Unanimous Consent of the Members to serve in such capacity pursuant to this Agreement. The Independent Engineer shall have knowledge with respect to facilities substantially similar to the Project. The fees of the Independent Engineer shall be paid by the Company. If the parties have not agreed upon the selection of an Independent Engineer within fifteen (15) calendar days following a request by a Member to select the Independent Engineer, then the Independent Engineer shall be selected by the American Arbitration Association as expeditiously as possible. The Members shall mutually cooperate to retain the Independent Engineer upon terms and conditions mutually satisfactory to the Members as soon as practicable after selection of the Independent Engineer by the American Arbitration Association.

(3) If the Independent Engineer resigns, or the Members agree to terminate the services of the selected Independent Engineer, or if a Member demonstrates that the Independent Engineer is subject to a conflict of interest or malfeasance, then the Members by Unanimous Consent, shall agree upon a replacement. The successor Independent Engineer shall not otherwise be associated with the transactions contemplated by this Agreement. The successor Independent Engineer shall have knowledge with respect to facilities substantially similar to the Project. If the Members have not agreed upon the selection of a successor Independent Engineer within fifteen (15) days following the resignation or termination of the Independent Engineer, a new Independent Engineer shall be selected by the American Arbitration Association as expeditiously as possible.

(c) **Resolution by Arbitration.** Controversies which are to be resolved by the Independent Engineer as provided in Section 6.7((b)) shall be resolved solely by the Independent Engineer and shall not be resolved by arbitration. If any material controversy between the Members involving the interpretation of or application of or compliance with this Agreement is not settled in accordance with the procedure set forth in Section 6.7((a)), then any Member shall thereafter have the right, exercisable within thirty (30) days following the notice provided for in Section 6.7((b))((3)) stating that the Conciliators are unable to resolve the dispute, to submit such controversy or claim to arbitration in accordance with the then-existing commercial arbitration rules of the American Arbitration Association.

(d) **Voting Rights Not Supplanted.** Notwithstanding any provision of this Agreement which could be construed to the contrary, the dispute resolution procedures set forth in this Section 6.7 are not available to, and may not be invoked, for the purpose of overriding, superseding or supplanting the Vote of any Members on any matter properly to be determined by a Vote of the Members.

6.8 **Company Budgets, and Expenses, and Bank Accounts.**

(a) **Company Budgets.**

(1) Establishment of Company Budgets.

(A) Development Period Budget. The Members shall cause to be prepared, for their Unanimous Consent, a Development Period budget (the "**Development Period Budget**"), which shall remain in effect, subject, however, to modifications from time to time as appropriate, from the date of execution of this Agreement up to the Closing Date. The Members, by Unanimous Consent, may waive the requirement for the Development Period Budget. The Development Period Budget shall be reviewed periodically by the Members, and the Members shall periodically cause revisions to be prepared, for their Unanimous Consent, as necessary in order to provide for the activities of the Company during the Development Period.

(B) Construction Period Budget. The Members shall cause to be prepared, for their Unanimous Consent, a construction period budget (the "**Construction Period Budget**"), which shall remain in effect throughout the construction period of the Project up to and including the Commercial Operation Date. The Manager shall deliver or cause to be delivered to each Member, within twenty (20) days after the end of each month, a comparison to the Construction Period Budget of actual draws of funds made pursuant to the Financing Documents. The Construction Period Budget shall be prepared in accordance with the applicable requirements of the Financing Documents.

(C) Operating Period Budget. The Members shall cause to be prepared, for their Unanimous Consent, a proposed annual Operating Period Budget ("**Operating Period Budget**"), which shall consist of a separate operating budget and a separate capital budget, together with an annual operating plan setting forth the underlying assumptions and implementation plans. Unless otherwise required by the Financing Documents, or the Members otherwise determine, the initial Operating Period Budget for the Company shall be for the period beginning on the Commercial Operation Date and ending on the next December 31. Subsequent Operating Period Budgets shall be for calendar years ending on December 31. The Operating Period Budget shall be presented to the Members for Unanimous Approval no later than ninety (90) days before the Commercial Operation Date in the case of the initial Operating Period Budget, and no later than ninety (90) days before January 1 in the case of each subsequent calendar year's Operating Period Budget. These dates may be adjusted by the Unanimous Consent of Members, as appropriate, if necessary, in order to comply with the requirements of the Financing Documents, or if they otherwise determine. Each proposed Operating Period Budget shall represent the best estimate of all revenues, loan proceeds, costs and expenses with respect to the Company for the period to which such Operating Period Budget relates, and its estimate of any capital expenditures required during such period. Each Operating Period Budget shall be prepared in accordance with the applicable

requirements of the Financing Documents. Each proposed Operating Period Budget shall become effective upon Approval by the Unanimous Consent of the Members.

(b) **Approval of Budget Items Relating to Emission Control Measures.** Notwithstanding the foregoing, QMH shall not be entitled to Vote upon, and sole Company Budget Approval rights shall be vested in FRH, or its permitted Transferee, with respect to budget items relating to emission control measures and the implementation thereof, whether such budget items are included within a Development Period Budget, Construction Period Budget, or Operating Period Budget. Notwithstanding the Budget Approval process, or any provision of this Agreement, FRH, or its permitted Transferee, is hereby empowered to incur any expenditures on behalf of the Company that it deems necessary or appropriate, and take any actions on behalf of the Company, with respect to the implementation of emission control matters.

(c) **Expenses of the Company.** All expenses incurred by the Company shall, to the extent practicable, be billed directly to and paid by the Company.

(d) **Bank and Money Market Accounts.** The Company shall maintain its cash funds in bank or money market accounts in its name at one or more banks or other financial institutions that a Majority in Interest of Members may select; provided, however, that such institution (a) shall be organized under the laws of the United States or any state thereof; and (b) unless a Majority in Interest of Members otherwise Consent, shall have a combined capital, surplus, and undivided profits of at least $100,000,000 and (c) shall be selected in accordance with the requisites of the Financing Documents. Company funds shall not be commingled with the funds of any other Person and shall be used only for Company Purposes.

6.9 **Liability and Indemnification of the Members and Manager.**

(a) **Exculpation of the Members and Manager.** The Members, the Manager and the trustees, beneficiaries, shareholders, constituent partners, officers, directors, members, employees, representatives, and agents of the Members (individually, a "**Member Indemnitee**") shall not be liable, responsible or accountable in damages or otherwise to the Company or to any of the Members for any act or omission performed or omitted (1) in good faith on behalf of the Company, and (2) in a manner not constituting willful misconduct, actual fraud, or gross negligence.

(b) **Indemnification of Members and Manager by the Company.** To the fullest extent permitted by the Act and applicable law, the Company, its receiver, or its trustee shall indemnify, defend and hold harmless each Member Indemnitee from and against any and all claims or threats thereof, expenses, judgments, losses, costs, damages, or liabilities or threats thereof, (including, without limitation, attorneys' fees and costs of investigation, testifying and defense relating to the Company) which such Person may incur by reason of being a Member, the Manager, or a trustee, beneficiary, shareholder,

member, constituent partner, officer, director or employee of a Member or the Manager (regardless of the disclosure or lack of disclosure of such status) or by virtue of taking any action pursuant to this Agreement in such capacity unless (1) such claim, expense or liability is caused by an act or omission performed or omitted by the Member Indemnitee in a manner constituting willful misconduct, actual fraud, or gross negligence; or (2) such Member Indemnitee did not conduct itself in good faith; or (3) such Member Indemnitee did not reasonably believe that its conduct was in the Company's best interest; or (4) in the case of any criminal proceedings, that it did not reasonably believe that its conduct was lawful. **It is understood and agreed by all Members that the Member Indemnitees shall be indemnified and held harmless for their own negligence.** Expenses incurred by a Member Indemnitee in defense or settlement of any claim that may be subject to indemnification may be advanced by the Company prior to the final disposition thereof (1) upon receipt of an undertaking by or on behalf of such Member Indemnitee to repay such amount if it is ultimately determined that such Member Indemnitee is not entitled to indemnification, and (2) a reasonable determination that such Member Indemnitee is able to repay such amounts. A Member Indemnitee may not be indemnified under this Section 6.9((b)) with respect to a proceeding in which: (i) the Member Indemnitee is found liable on the basis that the Member Indemnitee improperly received personal benefit, whether or not the benefit resulted from an action taken in the Member Indemnitee's official capacity; or (ii) the Member Indemnitee is found liable to the Company or to the Members.

(c) **Mandatory Indemnification of Successful Defense.** The Company shall indemnify a Member Indemnitee for the claims, expenses, and liabilities described in Section 6.9((b)), incurred by such Member Indemnitee in connection with a proceeding in which the Member Indemnitee has been wholly successful on the merits or otherwise, in the defense of the proceeding.

(d) **Insurance: Satisfaction From Company Assets.** The Company may purchase and maintain insurance on behalf of Member Indemnitees against any liability that may be asserted against or expense that may be incurred by such Person in connection with the Company's activities. Any indemnification from the Company provided for hereunder shall be satisfied out of Company assets (including insurance proceeds) only.

(e) **Determination that Standard has Been Met.** A determination that indemnification is permissible under this Section 6.9 may be made:

(1) By special legal counsel selected by a Majority in Interest of Members who at the time of the determination are not, and whose Affiliates are not, named defendants or respondents in the proceeding; or

(2) By any other method allowable under the Act.

6.10 **Other Matters Concerning Members and Manager.**

(a) **Reliance Upon Documents.** The Members and the Manager may rely upon and shall be protected in acting or refraining from acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, bond, debenture or other paper or document believed by them to be genuine and to have been signed or presented by the proper party or parties.

(b) **Reliance Upon Consultants and Advisors.** The Members and the Manager may consult with legal counsel, Accountants, Appraisers, management consultants, investment bankers, and other consultants and advisers selected by them, and any opinion of any one of those Persons as to matters that a Member or the Manager reasonably believes to be within that Person's professional or expert competence constitutes full and complete authorization and protection for any action taken or suffered or omitted by the Member or the Manager in good faith and in accordance with that opinion.

6.11 **Management Fee.** The Manager, or its designee, shall receive a management fee for managing the affairs of the Company, and for performing accounting and administrative services for the Company. The management fee shall be an expense of the Company and shall not be considered to be a distribution to the recipient of such fee pursuant to Section 5.2. The management fee may be changed (increased or decreased) by the Unanimous Consent of the Members.

7. ACCOUNTING AND RECORDS

7.1 **Fiscal Year.** The fiscal year of the Company shall be the year ended December 31, unless another period is designated by the Manager (a) if existing law, or a change in law require the selection of a different fiscal year or (b) with the consent of all Members, which Consent may be withheld in their sole and absolute discretion.

7.2 **Method of Accounting.** Unless otherwise provided herein, the Company's books of account shall be maintained in accordance with GAAP; provided, however, that for purposes of making allocations and distributions hereunder (including, without limitation, distributions in liquidation of the Company in accordance with Section 11.5((d))((2)), Capital Accounts and Profits, Losses and other items described in Articles 3 and 4 shall be determined in accordance with federal income tax accounting principles utilizing the accrual method of accounting, with the adjustments required by Treasury Regulation Section 1.704-1(b) to properly maintain Capital Accounts. Each Member acknowledges that the Capital Account balances of the Members for the purposes described in the preceding sentence are not computed in accordance with GAAP, and accordingly that any GAAP financial statements for the Company do not reflect their true Capital Account balances.

7.3 **Books and Records and Inspection.**

(a) **Maintenance of Books.** Proper and complete records and books of account of the Company's business, including all such transactions and other matters as are usually entered into records and books of account maintained by Persons engaged in businesses of like character or as are required by the Act, shall be kept at the Company's principal office and place of business or at such other office as shall be approved by a Majority in Interest of Members.

(b) **Provision of Books and Records.** The Manager shall cause to be promptly provided to each Member, upon written request, for any purpose reasonably related to the Member's Interest, and subject to Section 15.5 regarding confidentiality, access to the following:

(1) A current list of the full name and last known business or residence address of each Member, together with the Contributions and Sharing Ratio of each Member.

(2) A filed copy of the Company's certificate of formation and all certificates of amendment thereto, together with executed copies of any powers of attorney pursuant to which any certificate has been executed.

(3) Copies of the Company's federal, state and local income tax or information returns and reports.

(4) An original copy of this Agreement and all amendments thereto.

(5) Financial statements of the Company.

(6) The Company's books and records as they relate to the internal affairs of the Company.

7.4 **Reports.** The Manager shall cause the following to be sent to each Member:

(a) **Monthly Reports.** Within twenty (20) days after the end of each fiscal month of the Company, (1) a statement of income and expense for such month and for the Year to date compared to the applicable Company Budgets, and a balance sheet, (2) the Construction Period Budget reports described in Section 6.8((a))((1))((B)), and (3) any monthly reports provided to the Company by any operator of the Project.

(b) **Quarterly Reports.** Within forty-five (45) days after the end of each of the first three quarterly fiscal periods in each Year of the Company, a copy of: (1) a management prepared balance sheet, income statement, and statement of Members'

capital with respect to the Company as of the end of such quarter, and the Year to date; (2) a management prepared statement of income for the Company comparing the actual results for the quarter and the Year to date with budgeted amounts as set forth in the most recently approved and applicable Company Budgets, together with a narrative explanation of material variances between actual results and budgeted amounts; and (3) a summary of significant performance statistics with respect to the Project including information concerning construction activities, compliance with construction completion milestones and deadlines, and the operational performance of the Project.

(c) **Annual Report.** Within ninety (90) days after the end of each Year of the Company, a copy of: (1) a balance sheet of the Company, as at the end of that year, (2) a statement of income, Members Capital and changes in financial position of the Company for that Year, setting forth in comparative form the figures for the previous Year (if any), (3) a general description of the activities of the Company during the period covered by the report, and (4) a general description of material transactions between the Company and any Member or any Affiliates of any Member, including a description of the fees or compensation paid by the Company to a Member or its Affiliates, and the services performed by the Member or its Affiliate.

(d) **Alternative Reports.** In lieu of providing reports separately prepared at the direction of the Manager, the Manager may, if the information required to be given in any monthly, quarterly, or annual report, is contained in other documentation (such as, for example, reports provided pursuant to the Power Supply Agreement, or the Financing Documents), cause such other information to be provided to the Members in lieu of a separately prepared report.

7.5 **Audited Financial Statements.** The annual financial statements of the Company shall be audited (which audit shall be conducted in accordance with GAAP) and certified by the Company's Accountants.

7.6 **Tax Matters.**

(a) **Status of the Company.** The Members acknowledge that this Agreement creates a partnership for federal and state income tax purposes, and hereby agree not to elect to be excluded from the application of Subchapter K of Chapter 1 of Subtitle A of the Code or any similar state statute.

(b) **Tax Elections and Reporting.**

(1) *Fiscal Year.* The Company shall adopt the Fiscal Year described in Section 7.1 as the annual accounting period, for federal and state income tax purposes.

(2) *Code Section 754 Election.* The Manager shall, upon the written request of any Member benefited thereby, cause the Company to file an election under Code Section 754 and the Treasury Regulations thereunder to adjust the basis of the Company assets under Code Section 734(b) or 743(b), and a corresponding election under the applicable sections of state and local law.

(c) **Company Tax Returns.** The Accountants shall prepare or review the necessary federal income tax returns and information returns for the Company. Other tax returns shall be prepared in a manner directed by the Manager. Each Member shall provide such information, if any, as may be needed by the Company for purposes of preparing such tax and information returns. The Manager shall cause to be delivered to each Member within ninety (90) days after the end of each year a copy of the federal income tax returns for the Company as filed with the appropriate taxing authorities, and upon the written request of any Member, a copy of any state and local income tax return as filed. No Member shall report on its Federal Income Tax Return its distributive share of Company Profits or Losses or any Company item of income, gain, losses, deductions or credits in an amount or manner that is inconsistent with the Company's Federal Income Tax Return unless otherwise required by the Code or the Treasury Regulations.

(d) **Tax Audits.**

(1) *Federal Tax Matters.* QMH shall be the tax matters representative of the Company (the "**Tax Matters Member**") with respect to federal income tax audits. If QMH cannot or does not desire to serve as Tax Matters Member, then the Tax Matters Member shall be a Member appointed by a Majority in Interest of Members. The Tax Matters Member, as an authorized representative of the Company, shall direct the defense of any claims made by the IRS to the extent that such claims relate to the adjustment of Company items at the Company level. The Tax Matters Member shall promptly deliver to each Member a copy of any notice of beginning of administrative proceedings or any report explaining the reasons for a proposed adjustment received from the IRS relating to or potentially resulting in an adjustment of Company items. The Tax Matters Member shall keep each Member advised of all material developments with respect to any proposed adjustment which come to its attention, including, without limitation, the scheduling of all conferences and substantive telephone calls with the IRS. Each Member shall be entitled, at its own expense, to attend all meetings with the IRS and to review in advance any material written information (including, without limitation, any pleadings, memoranda or similar items) to be submitted to the IRS. Without first obtaining the Consent of a Member, the Tax Matters Member shall not, with respect to any proposed adjustment of a Company item which materially and adversely affects such Member, (A) enter into a settlement agreement which purports to bind Members other than the Tax Matters Member (including, without limitation, any stipulation consenting to an entry of decision by the Tax Court), or (B) enter into an agreement or stipulation extending the statute of limitations.

(2) *State and Local Tax Matters*. The Tax Matters Member shall promptly deliver to each Member a copy of all notices, communications, reports or writings of any kind with respect to income or similar taxes received from any state or local taxing authority relating to the Company which might materially and adversely affect each Member, and shall keep such Members advised of all material developments with respect to any proposed adjustment of Company items which come to its attention.

(3) *Continuation of Rights*. Each Member shall continue to have the rights described in this Section 7.6((d)) with respect to tax matters relating to any period during which it was a Member, whether or not it is a Member at the time of the tax audit or contest.

(4) *Reimbursement of Expenses of Tax Matters Member*. The Tax Matters Member shall be reimbursed for all expenses, disbursements, and advances incurred or made by it in connection with its obligations as Tax Matters Member of the Company, including its activities as Tax Matters Member associated with administrative or judicial proceedings concerning the tax liabilities of the Members which relate to their ownership of Interests in the Company.

8. COMPANY MEETINGS

8.1 **Meetings for Transaction of Company Business.** At any time the Manager, or any Member, may call a meeting of the Members to transact business that the Members or any group of Members may conduct as provided in this Agreement. The call must be made by notice to all other Members on or before the tenth (10th) day prior to the date of the meeting specifying the location and the time and stating the business to be transacted at the meeting, which must include any appropriate items the Members requesting the meeting have specified in their request. The chairperson of the meeting shall be an individual the Manager specifies. At the meeting, the Members may take any action included in the notice of the meeting by Vote of Members present, in person, by proxy, or, in the event of incapacity of a Member, by an attorney-in-fact, constituting Members whose approval is required for that action pursuant to the other provisions of this Agreement. With respect to other matters, the meeting must be conducted in accordance with rules reasonably established by the Manager and Approved by a Majority in Interest of Members represented at such meeting. A quorum shall consist of all Members, if the matter under consideration requires the Unanimous Consent of the Members, and in all other instances a quorum consists of at least the minimum number of Members, or Members possessing the required Company Sharing Ratios, as appropriate, required to Consent to the matter to be acted upon. The Manager shall be under no obligation to call meetings of the Members, and meetings of the Members are not required in order to obtain the Consent of the Members to any action of the Members or the Company. This Section 8.1 shall not be construed to grant to Members any Consent rights not specifically provided for in this Agreement.

9. TRANSFERS AND DISPOSITIONS OF INTERESTS

9.1 **No Change Except Pursuant to This Article.** No Member shall withdraw from or Transfer any interest in the Company, and no Person shall become an Assignee or be admitted to the Company as a substituted or additional Member, except as provided in this Article 9. Any transfer made in violation of this Article 9 shall be void. This Article 9, however, shall not be construed to prevent the assignment or pledge by any Member of all or any part of its interest in the Company as collateral security for the Company's obligations pursuant to the Financing Documents.

9.2 **Members.**

(a) **Permitted Assignments by Members.** At any time, a Member may Transfer all or part of its Membership Interest (but only if the transferor is not then in material default under this Agreement), provided that the following conditions are fully satisfied:

(1) any transferee agrees in writing, in form and substance acceptable to a Majority in Interest of Members to take such Membership Interest subject to and to be bound by the applicable terms, provisions and conditions of this Agreement, and has executed such other documents or instruments as may be required by a Majority in Interest of Members to effect such Transfer;

(2) all costs to the Company or to any other Member of such Transfer shall be paid by the transferee or transferor, including costs associated with the amendment of this Agreement;

(3) the Transfer shall not cause, directly or indirectly, a termination of the Company pursuant to Section 708 of the Code or a dissolution of the Company under the Act;

(4) the Transfer shall not cause, directly or indirectly, the Company to be classified as an entity other than a partnership for purposes of the Code;

(5) the transferee is a sophisticated investor and not an individual;

(6) the Transfer is accomplished in a non-public offering in compliance with and exempt from any registration or qualification requirements under the Securities Act of 1933, as amended, or any other applicable Federal or state securities laws and regulations;

(7) the Transfer shall not result in a breach or violation of, or an event of default or right of termination under, any material obligation or material agreement to which the Company is a party (including the Material Contracts and the

Financing Documents) or give rise to a right to accelerate any indebtedness of the Company;

(8) the Transfer shall not result in a breach or violation of any permit, order, rule, regulation, or other applicable law or require any governmental approval;

(9) each other Member has received an opinion of counsel to the transferor or transferee, from a law firm, and in form and substance reasonably acceptable to a Majority in Interest of Members, addressing the matters specified in clauses (3) through (8) above;

(10) the transferee has been Consented to by all Members which Consent shall not, except as otherwise expressly provided for herein, be unreasonably withheld;

(11) the Transfer shall not cause the status of the Project as an Exempt Wholesale Generator, within the meaning of PUHCA, or any successor law, to be lost.

9.3 **Substitution of Members.** Any permitted transferee under Section 9.2 who is not already a Member shall become a substituted Member only if (a) the assignor or transferor has so provided in the conveyance, (b) such transferee has agreed in writing to become a Member herein and to be bound by all the terms and conditions of this Agreement, and (c) each Member has Consented to such permitted transferee becoming a substitute Member, which Consent may be withheld in their sole discretion, unless the transferee is acquiring 100% of the Membership Interest of QMH or FRH, in which event such Consent may not be unreasonably withheld. Until admitted to the Company as a substituted Member, any permitted transferee shall not be entitled to Vote on Company matters, and shall not have any other rights of a Member other than the right to Profits, Losses, and distributions.

9.4 **Right of First Offer.** Before any Member may Transfer all or part of its Membership Interest pursuant to Section 9.2, with the exception of Transfers to an Affiliate, that Member (the "**Selling Member**") shall notify the Manager in writing that the Selling Member intends to Transfer its Membership Interest. The notice shall contain a full and complete designation of the price at and terms upon which the Selling Member is proposing to Transfer its Company Interest. The Members, other than the Member whose interest is the subject of such Transfer, will have the unilateral option to acquire the interest of the Selling Member, upon the following terms and conditions:

(a) **Members' Option.** The Manager shall immediately notify each Member, and each Member (other than the Member whose Interest is the subject of the proposed Transfer), shall have the right to purchase that portion of the Interest that its

Sharing Ratio bears to the Sharing Ratios of the other Members entitled to participate in such purchase. Each such Member shall have twenty (20) days from the date it actually receives notice from the Manager within which to accept the offer and agree to purchase such Interest, or any portion thereof. If any Member declines to purchase its proportionate part of the Interest, the Manager shall promptly notify the Members electing to participate in such purchase, and each such participating Member may agree to purchase, within twenty (20) days from the date of receipt of such notice, that portion of the rejected Interest that its Sharing Ratio bears to the Sharing Ratios of all such participating Members. If any Interest remains unpurchased subsequent to the procedure established in the immediately preceding sentence, such procedure shall be repeated by the Members who elected to purchase until no Interest remains unpurchased, or until no Member has agreed to purchase an additional portion of the transferred Interest. The election to purchase a portion of the Interest by a Member must be made in writing and delivered to the Manager within the specified option period, and failure to accept in that manner and within the specified time shall constitute a rejection. If the other Members elect not to exercise their right to purchase the entire Interest proposed to be transferred, the Selling Member may Transfer the entire Membership Interest proposed to be transferred, but not less than such entire Interest, for a price and on terms no less favorable to the Selling Member than those described in the notice, for a period of one hundred eighty (180) days following the date of the notice provided by the Manager to the Members pursuant to the first sentence of this Section 9.4((a)). If the Selling Member does not complete the Transfer of the entire Membership Interest proposed to be transferred during this period, the provisions of this Section 9.4 shall again apply to any later Transfer.

(b) **Rights of Purchaser.** A purchaser of all or any portion of the Selling Member's Membership Interest, other than an existing Member, shall have the status of an Assignee and shall become a Substitute Member only upon satisfaction of all of the requirements of Section 9.3.

(c) **Prohibited Utility Status.** No purchase of all or any portion of the Selling Member's Membership Interest shall be made by a Member, if such purchase would cause the Project or the Company to have Prohibited Utility Status, or result in a breach or violation of any permit, order, rule, regulation, or other applicable law.

9.5 **Withdrawal of Members from Company: Void Transfers.** Unless otherwise expressly stated in this Agreement, no Member has the right to withdraw from the Company before the Company dissolves, and is wound up, liquidated and terminated pursuant to Article 11. Any attempted Transfer in violation of this Article 9 by any Member shall be void and of no force or effect.

9.6 **Acquisition of Membership Interest Upon an Unauthorized Transfer or the Occurrence of a Purchase Event.** Upon the occurrence of a Purchase Event with

respect to a Member, or if a Member's Interest in the Company is subjected to a lawful "charging order," or if a Member makes an unauthorized Transfer or assignment of a Membership Interest, which the Company is required by law (and by order of a court) to recognize, the Members, other than the Member whose Interest is the subject of such Transfer or Purchase Event, will have the unilateral option to acquire the Interest of the transferee, Assignee, or Member with respect to which the Purchase Event has occurred (a "**Purchase Option Member**"), or any fraction or part thereof, upon the following terms and conditions.

(a) **Members' Option.** The Manager shall immediately notify each Member, and each Member (other than the Member whose Interest is the subject of the Transfer or Purchase Event at issue), shall have the right to purchase that portion of the Interest that its Sharing Ratio bears to the Sharing Ratios of the other Members entitled to participate in such purchase. Each such Member shall have twenty (20) days from the date it actually receives notice from the Manager within which to accept the offer and agree to purchase such Interest, or any portion thereof. If any Member declines to purchase its proportionate part of the Interest, the Manager shall promptly notify the Members electing to participate in such purchase, and each such participating Member may agree to purchase, within twenty (20) days from the date of receipt of such notice, that portion of the rejected Interest that its Sharing Ratio bears to the Sharing Ratios of all such participating Members. If any Interest remains unpurchased subsequent to the procedure established in the immediately preceding sentence, such procedure shall be repeated by the Members who elected to purchase until no Interest remains unpurchased, or until no Member has agreed to purchase an additional portion of the transferred Interest. The election to purchase a portion of the Interest by a Member must be made in writing and delivered to the Manager within the specified option period, and failure to accept in that manner and within the specified time shall constitute a rejection.

(b) **Determination of Purchase Price.** Unless the Company or the purchasing Members, as the case may be, and the transferee, Assignee, or Purchase Option Member agree otherwise, the purchase price for the Interest, or any fraction thereof, shall be determined by an Appraisal. The Appraiser shall be selected by the Members (excluding any Member whose Interest or whose Affiliate's Interest is the subject of such Transfer or Purchase Event).

9.7 **Effect of Transfer.**

(a) **Responsibility for Obligations.** No Transfer of an Interest by a Member, including a Transfer of less than all of its rights under this Agreement or the Transfer of all of its rights under this Agreement to more than one Person, relieves that Member of its obligations under this Agreement arising before that Transfer or, unless the Assignee becomes a substituted Member, arising after that Transfer.

(b) **Assignee as Member for Tax Purposes.** The Company may treat an Assignee as a Member solely for tax purposes. Accordingly, the Company may deliver to any Assignee the income tax reports distributable to the Member through whom the Assignee claims an Interest (such as K-1's and any state equivalents); and the Assignee must report all the income and loss so reported on its individual tax return as required by the Code.

10. WITHDRAWAL AND REMOVAL OF MANAGER

10.1 Right to Remove.

(a) The Manager shall serve in such capacity until its appointment is revoked in writing (with cause only) by the Unanimous Consent of Members (excluding the Member that is the Manager), until it ceases to be a Member, or until it ceases to serve for any other reason. FRH, or its successors, shall not be removed as Manager, if such removal would (i) in the written opinion of independent counsel selected by FRH, or its successors, and Approved by QMH, cause the Company to be considered to be under common control with Public Service Company of Colorado, e-prime, Inc., or any Affiliate of New Century Energies, Inc., with the result that the Project would be considered, together with any generating facilities operated by Public Service Company of Colorado, e-prime, Inc., or any other Affiliate of New Centuries, Inc., to constitute a single source, or (ii) result in a violation of the Project's air permit or federal or state law relating to air pollution, or result in a material violation of any other applicable law, rule or regulation. A Manager that is removed from such position shall continue to remain as a Member, if otherwise qualified. For the purposes of this Section 10.1(a), "cause," for removal of the Manager, shall mean (i) such Manager's failure to timely make a required Contribution; (ii) the commencement of bankruptcy proceedings by or against such Manager, (iii) such Manager's breach of any material provision of this Agreement, (iv) such Manager's breach of its fiduciary duties; or (v) if the Manager and its Affiliates cease to hold, in the aggregate, Company Interests representing 10% of the Sharing Ratios of all Members, and (vi) the cessation of such Manager's existence as a legal entity.

Notwithstanding the foregoing, however, with respect to any of the events constituting cause for removal, as described above, other than the events described in Sections 10.1(a)(vi) and (vii), the Manager shall not be removed if the Manager has, within thirty days following receipt by the Manager of a notice delivered by the removing Members, delivered a notice to each such removing Member describing in writing, and in reasonable detail, the nature of the actions it intends to take to resolve the issue and rectify the consequences thereof, and has within such time period diligently undertaken to commence such actions, and within sixty days after delivery of such notice, has resolved the issues and rectified the consequences thereof in a manner reasonably acceptable to the removing Members.

(b) **Replacement of Manager.** If a Manager ceases to serve in such capacity for any reason, a new Manager shall be promptly appointed by the Unanimous Consent of the Members. Such Manager shall not be affiliated with QMH, Public Service Company of Colorado, e-prime, Inc., or New Century Energies, Inc. It is the express intention and agreement of the parties hereunder, that at no time during the life of the Project shall the Manager be affiliated with QMH, Public Service Company of Colorado, e-prime, Inc., or New Century Energies, Inc. The provisions of Section 6.4, 6.8((b)), and other provisions related to the designation of a Manager if QMH were to become the only Member, and the prohibitions placed upon QMH from Voting on emission control measures, shall apply with full force and effect with respect to the selection, rights and obligations of a substitute Manager.

11. DISSOLUTION, TERMINATION AND LIQUIDATION

11.1 **No Termination.** Except as expressly provided in this Agreement, no Member shall have the right, and each Member hereby agrees not to, dissolve, terminate or liquidate the Company. No Member shall have the right, and each Member hereby agrees not to, petition a court for the dissolution, termination or liquidation of the Company except as such rights are provided in this Agreement or are available under applicable law notwithstanding any agreement herein to the contrary.

11.2 **Events of Dissolution and Termination.** The Company shall be dissolved and terminated upon the occurrence of any of the following:

(a) **Expiration of Term.** Expiration of the term of the Company set forth in Section 2.3.

(b) **Consent of Members.** The Unanimous Consent of the Members to dissolve the Company, but only on the effective date of dissolution specified by such Members.

(c) **Illegality.** Any event which makes it unlawful for the Company business to be continued.

(d) **Judicial Decree.** The entry of a decree of judicial dissolution under Section 18-802 of the Act.

(e) **Other Events.** Any other event which, notwithstanding an agreement to the contrary, causes a dissolution and termination of the Company under the Act.

11.3 **Insolvency of Member.** A dissolution of the Company shall not be caused by the Bankruptcy, removal, withdrawal, dissolution or liquidation of a Member or the substitution of a Member.

11.4 **Continuation of Business of Company.** If there are multiple Members and one or more Members are removed, dissolve, liquidate, withdraw or cease to serve for any other reason, and there is at least one remaining Member, the business of the Company shall continue by the remaining Member without amendment to this Agreement.

11.5 **Procedures Upon Dissolution.**

(a) **General.** If the Company dissolves, and if the Company is not to be continued, it shall commence winding up pursuant to the appropriate provisions of the Act and the procedures set forth in this Section 11.5. Notwithstanding the dissolution of the Company, prior to the termination of the Company, the business of the Company and the affairs of the Members, as such, shall continue to be governed by this Agreement.

(b) **Control of Winding Up.** The winding up of the Company shall be conducted under the direction of the Manager; provided, however, that if the Manager is a Member that caused the dissolution of the Company in contravention of this Agreement, such Manager shall not participate in the control of the winding up of the Company and if, in such event there is no other Manager, a Liquidator shall be appointed by a Majority in Interest of Members, and provided further, that if the dissolution is caused by entry of a decree of judicial dissolution pursuant to Section 11.2((d)), the winding up shall be carried out in accordance with such decree. The Manager, or if liquidation is conducted by a Liquidator appointed by a Majority in Interest of Members, such Person, is referred to herein as the "Liquidator."

(c) **Manner of Winding Up.** The Company shall engage in no further business following dissolution, if the Company is to be liquidated and terminated, other than that necessary for the orderly winding up of the Company business and distribution of assets. The maintenance of offices shall not be deemed a continuation of the business for purposes of this Section 11.5((c)). Upon dissolution of the Company, the Liquidator shall (i) cause to be filed with the Delaware Secretary of State a certificate of dissolution in accordance with the Act, and (ii) determine the time, manner and terms of any sale or sales of Company Property pursuant to such winding up, consistent with its fiduciary responsibility and having due regard to the activity and condition of the relevant market and general financial and economic conditions. Distributions may be made in kind to the Members only with the Unanimous Consent of the Members. If assets are distributed in kind then such assets shall be distributed in the manner described in Section 5.4. It is intended by the Members that no different treatment of a Member shall result from a decision to distribute assets in kind as opposed to selling them prior to liquidation.

(d) **Application of Assets.** In the case of a dissolution and liquidation of the Company, the Company's assets shall be applied as follows:

(1) *Creditors.* First, to payment of the liabilities of the Company owing to third parties (including Affiliates of the Members) and to Members. After payment of any such known liabilities, the Liquidator shall set up such Reserves as are reasonably necessary for any contingent or unforeseen liabilities or obligations of the Company. Such Reserves may be paid over by the Liquidator to an escrow holder or trustee, to be held in escrow or trust for the purpose of paying any such contingent or unforeseen liabilities or obligations, and, at the expiration of such period as the Liquidator may deem advisable, such reserves shall be distributed to the Members or their assigns in the manner set forth in Section 11.5((d))((2)) below.

(2) *Members.* Second, to the Members in accordance with the credit balances in their Capital Accounts, after, as applicable, (i) all allocations of Profits or Losses and other items pursuant to Article 4 and (ii) adjustment of the Members' Capital Account balances pursuant to Section 3.1((c))((1)), provided that if there are insufficient assets available to pay to each Member the positive balance in such Member's Capital Account, the available assets shall be distributed to the Members with positive Capital Accounts in proportion to their respective positive Capital Account balances. All distributions pursuant to this Section 11.5((d))((2)) shall be made no later than the end of the Company taxable year during which the liquidation of the Company occurs (or if later, within ninety (90) days after the date of such liquidation).

(3) *Indebtedness to Company.* If any Member is indebted to the Company, the Liquidator shall, until such Member has repaid the Company, retain such Member's distributive share of Company Property and apply it to the repayment of the Member's indebtedness. The balance of the Member's distributive share shall be delivered to the Member.

11.6 **Termination of Company.** Upon the completion of the liquidation of the Company and the distribution of all Company assets, the Company's affairs shall terminate and the Members shall cause to be executed and filed a certificate of cancellation of the Company's certificate of formation pursuant to the Act, as well as any and all other documents required to effectuate the termination of the Company.

11.7 **No Obligation to Restore Deficit Capital Account Balance.** No Member has any obligation to restore a deficit balance in his or its Capital Account, or to make any Contributions to the Company in order to restore such deficit balance, or to make any Contribution to the capital of the Company solely by reason of such deficit Capital Account balance. Any deficit balance in a Member's Capital Account shall not be considered an asset of the Company or of any Member.

12. EXEMPT WHOLESALE GENERATOR STATUS

12.1 **Exempt Wholesale Generator.** The Members intend that the Company meet the requirements of an Exempt Wholesale Generator. Therefore, the Members shall undertake any and all actions that are reasonably necessary for the Company to meet the requirements of an Exempt Wholesale Generator. Under no circumstances shall any Member or the Company take or consent to be taken any action which would cause (a) the Company to fail to satisfy the criteria of an Exempt Wholesale Generator, or (b) the Company to have Prohibited Utility Status. All Persons owning an Interest in the Company shall take any and all action reasonably necessary to maintain the Project's classification as an Eligible Facility and the Company's classification as an Exempt Wholesale Generator.

12.2 **Remedial Measures.** If any Member causes the loss of Exempt Wholesale Generator status, then that Member shall take such action as may be reasonably necessary to bring the Company back within the requirements of an Exempt Wholesale Generator so long as the action required under this Section 12.2 does not materially and adversely affect the Company, any Member or the Project or cause a default under any Material Contracts.

13. REPRESENTATIONS AND WARRANTIES OF MEMBERS

Each Member hereby represents and warrants as of the Execution Date as follows:

13.1 **Due Organization.** Such Member is a corporation, partnership or limited liability company, as the case may be, duly organized, validly existing and in good standing under the laws of its respective state of formation, and is qualified to transact business in all jurisdictions where the ownership of its properties or its operations require such qualification, except where the failure to so qualify would not have a material adverse effect on its financial condition or on its ability to own its properties or transact its business.

13.2 **Authority.** Such Member has the corporate or partnership or limited liability company power and authority to enter into and perform its obligations hereunder and to consummate the transactions herein contemplated in accordance with the terms, provisions and conditions hereof. All corporate or partnership or limited liability company proceedings required to be taken by such Member to authorize it to execute, deliver and perform the terms of this Agreement have been taken.

13.3 **Valid and Binding Obligations.** This Agreement has been duly and validly executed by such Member and constitutes a valid, binding, and enforceable obligation, enforceable against such Member in accordance with its terms, except as such enforceability may be limited or denied by (a) applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors' rights and the enforcement

of debtors' obligations generally and (b) general principles of equity, regardless of whether enforcement is pursuant to a proceeding in equity or at law.

13.4 **No Consents or Violations.** The execution, delivery and performance of this Agreement by such Member will not (a) except for the consents for such Member which have been duly obtained, require the consent of any Person, (b) violate the charter documents of such Member, (c) violate, or be in conflict with, or constitute a material default or event of default under, or cause or permit the acceleration of the maturity of, or give rise to any right of termination under, any material debt, obligation, contract, commitment or other agreement to which such Member is a party or by which any of its properties or assets is or may be bound, which event would have a material adverse effect on the financial condition of such Member or the ability of such Member to fulfill its obligations hereunder, or (d) result in the creation or imposition of any lien or encumbrance upon the Interest held or acquired by such Member.

13.5 **No Litigation.** There are no actions, suits or proceedings pending or, to each Member's knowledge, threatened at law or in equity before any court, arbitrator, or administrative or governmental officer or governmental Person to which such Member is or, to such Member's knowledge, may become a party, which event would have a material adverse effect on the financial condition of such Member or the ability of such Member to fulfill its obligations hereunder.

14. UCC ELECTION: ISSUANCE OF CERTIFICATES

14.1 **UCC Article 8 Election.** The Company hereby irrevocably elects that all Company Interests shall be securities governed by Article 8 of the Uniform Commercial Code as in effect in the State of Delaware. Each certificate evidencing Company Interests, if certificates are issued, shall bear, in addition to the legends described below in Section 14.2, the following legend:

> This Certificate evidences an Interest in Front Range, LLC, and shall be a security for purposes of Article 8 of the Uniform Commercial Code as in effect in the State of Delaware.

No change to this provision shall be effective until all outstanding certificates have been surrendered for cancellation and any new certificates thereafter issued shall not bear the foregoing legend.

14.2 **Form of Interest Certificates.** If the Manager deems it necessary or appropriate for the Membership Interests of the Company to be evidenced by a physical instrument, it may adopt a form of Interest Certificate to represent the Membership Interests. Each Interest Certificate shall be signed in the name of the Company by the Manager and shall certify the number of Membership Interests owned by the respective Member. Any or all of the signatures on an Interest Certificate may be facsimile. There

shall also appear conspicuously on the Interest Certificates (i) a statement to the effect that the Interests are subject to restrictions upon transfer, and (ii) any required federal or state securities legends.

14.3 **Issuance of Interest Certificates.** If a form of Interest Certificates has been adopted by the Manager, each Member shall be entitled to be issued an Interest Certificate certifying the number of Interests owned by the Member. The Interest Certificates shall be deemed issued when signed by the Manager on behalf of the Company and delivered to the Members or their Assignees. If the Manager elects to adopt Interest Certificates, Members may transfer their Interests only by endorsing and delivering to Assignees the Interest Certificate relating to their Interests, subject, however, to the additional requirements of this Agreement. If the endorsement is on a separate document, Members must deliver to Assignees both the document and the Interest Certificate relating to their Interests. The Manager may, in addition, designate a transfer agent, and require that all assignments or Transfers of Interests be made only through such transfer agent.

14.4 **Lost, Stolen, or Destroyed Interest Certificates.** The Company may issue a new Interest Certificate in place of any previously issued Interest Certificate alleged to have been lost, stolen, or destroyed, and the Manager may require the Member owning the lost, stolen, or destroyed Interest Certificate (or the Member's legal representative) to give the Company a bond (or other adequate security) sufficient to indemnify it against any claim that may be made against it (including any expense or liability) on account of the alleged loss, theft or destruction of any Interest Certificate or the issuance of the new Certificate.

14.5 **Surrender and Cancellation of Certificates.** When this Agreement is amended in any way affecting the statements contained in any Interest Certificate representing outstanding Interests, or it otherwise becomes desirable for any reason, at the discretion of the Manager, to cancel any outstanding Interest Certificate and to issue a new Interest Certificate therefor conforming to the rights of the Member that is the holder of the Interest Certificate, the Manager may order any Members holding an outstanding Interest Certificate to surrender and exchange them within a reasonable time to be fixed by the Manager.

15. MISCELLANEOUS PROVISIONS

15.1 **Disclaimer of Agency.** This Agreement shall not constitute any Member the legal representative or agent of the other, nor shall any Member have the right or authority to assume, create or incur any liability or obligation, express or implied, against, in the name of or on behalf of any other Member or the Company.

15.2 **Amendment.** Except for an amendment specifically authorized herein, any amendment to this Agreement must be in writing and approved by each Member.

15.3 **Consequential Damages.** Neither the Company nor any Member shall be liable to any other Member or the Company for special, indirect or consequential damages resulting or arising out of this Agreement, including loss of profit; provided, however, that this Section 15.3 shall not diminish the effects of Section 6.9 regarding indemnification.

15.4 **Counterparts.** The Members may execute this Agreement in two or more counterparts, which shall, in the aggregate, be signed by all the Members. Each counterpart shall be deemed an original instrument as against any Member who has signed it.

15.5 **Governing Law.** THE LAWS OF THE STATE OF DELAWARE SHALL GOVERN THE CONSTRUCTION, INTERPRETATION AND EFFECT OF THIS AGREEMENT.

15.6 **Binding Effect.** This Agreement shall be binding on all successors and assigns of the Members and inure to the benefit of the respective permitted successors and assigns of the Members, except to the extent of any express contrary provision in this Agreement.

15.7 **Partial Invalidity.** If any term, provision, covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the rest of this Agreement shall remain in full force and effect and shall in no way be affected, impaired, or invalidated.

15.8 **Captions.** Titles or captions of Sections or Articles contained in this Agreement are inserted only as a matter of convenience and for reference, and in no way define, limit, extend or describe the scope of this Agreement or the intent of any provision hereof.

15.9 **Entire Agreement.** This Agreement contains the entire agreement of the Members relating to the rights granted and obligations assumed in this Agreement. Any oral representation or modifications concerning this Agreement shall be of no force or effect unless contained in a subsequent written modification signed by the party to be charged.

15.10 **No Rights in Third Parties.** The provisions of this Agreement are for the benefit of the Company and the Members, and are not intended to be for the benefit of any Person to whom any debts, liabilities or obligations are owed, or who otherwise has any claim against the Company or any Member, and no creditor or other Person shall obtain any rights under such provisions or solely by reason of such provisions shall be able to make any claims in respect of any debts, liabilities or obligations against the Company or any of the Members.

15.11 **No Right to Partition.** No Member shall have the right to bring an action for partition against the Company. Each of the Members hereby irrevocably waives any and all rights which it may have to maintain an action to partition Company property or to compel any sale or transfer thereof.

15.12 **No Title to Company Property.** All Property owned by the Company, whether real, personal or mixed, and whether tangible or intangible, shall be deemed to be owned by the Company as an entity, and no Member, individually, shall have any ownership interest in such Property.

15.13 **Additional Documents.** Each party hereto agrees to execute, with acknowledgment or affidavit, if required or deemed appropriate, any and all documents and writings which may be necessary or expedient in connection with the creation of the Company and the achievement of its Purpose, specifically including such certificates and other documents as the Manager reasonably deems necessary or appropriate to form, qualify or continue the Company as a limited liability company in all jurisdictions in which the Company conducts or plans to conduct business.

15.14 **Members Not Named.** Unless named in this Agreement, or unless admitted to the Company as a Member, as provided in this Agreement, no Person shall be considered a Member. Subject to rights granted to Assignees hereunder or under the Act, the Company and the Members need deal only with Persons so named or admitted as Members; provided, however, that any distribution by the Company to the Person shown on the Company records as a Member or its legal representative or the Assignee of the right to receive Company distributions as herein provided, shall relieve the Company and the Members of all liability to any other Person who may be interested in such distribution by reason of any other assignment by the Member or by reason of its death, Bankruptcy, incompetency, or for any other reason.

15.15 **Confidentiality of Information.** The Members acknowledge that they may receive information regarding the Company in the nature of trade secrets or that otherwise is confidential, the release of which may be damaging to the Company or Persons with which it does business. Each Member shall hold in strict confidence any information it receives regarding the Company that is identified as being confidential (and if that information is provided in writing, that is so marked) and may not disclose it to any Person other than another Member, except for disclosures (a) compelled by law (but the Member must notify the Manager promptly of any request for that information, before disclosing it, if practicable), (b) to advisers or representatives of the Member, who have a legitimate need to know such information, and have been advised of the provisions of this Section and the confidential nature of the information, or (c) of information that the Member also has received from a source independent of the Company that the Member reasonably believes obtained that information without breach of any obligation of confidentiality. The Members acknowledge that breach of the provisions of this Section

may cause irreparable injury to the Company and the Members for which monetary damages are inadequate, difficult to compute, or both. Accordingly, the Members agree that the provisions of this Section may be enforced by specific performance.

15.16 **Notices.** Any written notice or communication to any of the Members required or permitted under this Agreement shall be deemed to have been duly given and received (a) on the date of service, if served personally or sent by telex or facsimile transmission (with appropriate confirmation of receipt) to the party to whom notice is to be given, or (b) on the fourth (4th) day after mailing, if mailed by first class registered or certified mail, postage prepaid, and addressed to the party to whom notice is to be given at the address as set forth below, or at the most recent address specified by written notice given to the other Members, or (c) on the next day if sent by a nationally recognized courier for next day service and so addressed and if there is evidence of acceptance by receipt. Notices to the Company shall be similarly given, and addressed to it at its principal place of business.

If to FRH: FR Holdings, L.L.C.
370 Van Garden Street
Lakewood, Colorado 80228-8304
Attention: Philip K. Smith

If to QMH: Quixx Mountain Holdings, LLC
Amarillo National's Plaza/Two
500 S. Taylor, Suite 1100, LB 254
Amarillo, Texas 79101-2442
Attention: James D. Steinhilper

15.17 **Breach of Agreement by Member.** A Member who is in breach of this Agreement shall be liable to the Company for damages caused by the breach. The Company may offset for the damages against any distributions or return of capital to the Member who has breached this Agreement.

IN WITNESS WHEREOF, the Members have executed this Agreement on the _____ day of _____, 1999.

MEMBERS:

QUIXX MOUNTAIN HOLDINGS, LLC

By:_____
Name: James D. Steinhilper
Title: President

FR HOLDINGS, L.L.C.

By:_____
Name: _____
Title: Vice President

SCHEDULE A

NAMES, ADDRESSES, CAPITAL CONTRIBUTIONS, AND INITIAL SHARING RATIOS OF THE MEMBERS

NAMES AND ADDRESSES	CAPITAL CONTRIBUTIONS	INITIAL SHARING RATIOS
Quixx Mountain Holdings, LLC	$10.00	50%
FRH Holdings, L.L.C.	$10.00	50%

In addition to the Capital Contributions set forth above, the Members shall make the Capital Contributions Approved by the Manager and the Members, or provided for, when agreed upon and executed in the Funding Agreement.

K N Energy, Inc.
370 Van Gordon Street
P.O. Box 281304
Lakewood, CO 80228-8304
(303) 989-1740

Richard Long
U.S. Environmental Protection Agency
Region VIII
999-18th Street, Suite 500
Denver, Colorado 80202-2466

Re: Pending Permit Application of Front Range Energy Associates, LLC with the Colorado Air Pollution Control Division

Dear Mr. Long:

The purpose of this letter is to provide information concerning the issue of whether the proposed power generating facility at Fort Lupton owned by Front Range Energy Associates, LLC, ("**Front Range**"), should be considered a separate source from a back-up generating facility at Ft. Lupton owned by Public Service Company of Colorado ("**PSCo**"), for air permitting purposes. If the Front Range Fort Lupton facility is a separate source not under common control with PSCo, it could obtain a synthetic minor source permit under the PSD requirements and the completion of the permitting process could be expedited. To help ensure the availability of sufficient power beginning in 2000, Front Range is obligated to complete the Fort Lupton facility on or before May 7, 2000. Financing of the facility will be achieved through project specific non-recourse debt financing. Financing must close by September 30, 1999 in order to ensure that the facility can be funded, and that the May 7, 2000 deadline can be met. Financing cannot close, and construction cannot commence, however, until receipt of the construction air permit.

Front Range submits that the following information supports the conclusion that the Front Range facility is a separate source from the PSCo generators, and that a synthetic minor construction permit can therefore issue.

I. Ownership and Management Structure of Front Range Energy Associates, LLC

Front Range is a Delaware limited liability company created pursuant to Deleware law. Front Range was formed upon the filing of a Certificate of Formation with the Delaware Secretary of State, and as required, has been qualified to conduct business in Colorado. Under Delaware law, a limited liability company is a distinct entity, separate and apart from its constituent owners. Front Range is owned by its two members, Quixx Mountain Holdings, LLC ("QMH"), and FR Holdings LLC ("FRH"), in the following percentages: QMH - 49% and FRH - 51%. QMH and FRH selected the limited liability company entity as the entity of choice for specific reasons. First, a limited liability company, as a statutorily-created separate stand-alone entity, affords its members limited liability, in the same manner that a corporation affords its shareholders limited liability. Second, the limited liability company also allows the separation of management and control from economic ownership through its governing document, the limited liability company agreement. Thus, a limited liability company can be governed by its members or by a manager. The Front Range Limited Liability Company Agreement establishes that FRH will exercise management control over Front Range as its manager.

As Manager, FRH will possess virtually all responsibility for, and control of, the operations of the Project. FRH will act as the company's representative with respect to the third-party operator's ("**General Electric Company**") operational and administrative activities under the Power Supply Agreements, and will monitor the performance of General Electric Company's operation and maintenance services. In addition, FRH will be vested with the sole authority to make decisions concerning emissions and pollution control (including sole budgeting and expenditure authority related thereto), during both the construction and operational phases of the Project. FRH posses the sole right to negotiate with PSCo and e prime, and the sole right to make all decisions on behalf of Front Range with respect to the PSCo and e prime PPAs.

Because QMH possesses a minority interest in Front Range, QMH cannot veto or dictate decisions made by FRH with respect to the management and operations of the Company, including but not limited to the establishment of budgets. In summary, because FRH is Manager vested with control over the Company, and because QMH possesses a minority interest in Front Range, FRH possesses sole management control over Front Range.

II. The Project

Front Range was formed for the sole purpose of developing, financing, operating and owning an approximately 164 megawatt single-cycle generating facility, consisting of four GE LM6000 combustion turbine generators, in Fort Lupton, Colorado (the "**Project**").

The Project is being developed in response to PSCo's request for proposals issued on October 20, 1998, pursuant to a mandate by the Colorado Public Utility Commission. Because of a short-fall in generation, PSCo experienced blackouts in the summer of 1998. The Colorado Public Utility Commission ("PUC"), in reaction to these blackouts, mandated that PSCo pursue requests for proposals for additional generation. The PUC ordered that the new generating capacity be built by the summer of 2000, and indicated that the new generation should be at sites that would "mitigate the transmission and ancillary costs related to connection to the Company's system" and have "availability of natural gas transportation capacity." (PUC Order dated October 2, 1998, Decision No. C98-1042 at 8.) Front Range considered those criteria in responding to the requests for proposal and proposed the Project be located at the Ft. Lupton site because of ownership of the property by an affiliate of FRH, the quick access to the PSCo property and transmission lines, and the location of numerous natural gas pipelines beneath the property.

Throughout the RFP and contracting process, the PUC mandated that stringent requirements of independence be observed to prevent any preferential treatment of FRH because of the "affiliate" relationship between QMH and PSCo under the definitions contained in the federal Public Utilities Holding Company Act.[1] An independent evaluator was used to review and to select the winning bid. Front Range was selected as one of several providers of additional generation by the independent evaluator based upon a competitive, all resource solicitation.

FRH conducted all negotiations with PSCo on behalf of Front Range, in order to eliminate any potential concerns regarding the fairness of the process. Throughout these negotiations an independent evaluator was present at all meetings between FRH and PSCo to assist in the negotiations and to make sure Front Range did not obtain any advantage. To ensure against non-PUC authorized communications or other dealings,

[1] QMH is a wholly-owned subsidiary of Quixx Corporation, a Texas corporation. Quixx Corporation is a wholly-owned subsidiary of NC Enterprises, Inc., and NC Enterprises, Inc. is a wholly-owned subsidiary of New Century Energies, Inc. PSCo is also a subsidiary of New Century Energies, Inc. See chart reflecting New Century Energies, Inc. affiliates (Attachment A).

PSCo and QMH were subject to an internal company separation policy. In addition, all permitting activities of Front Range, including specifically air permitting activities, have been conducted by FRH or KN Power Company, and not by QMH.[2] . The land on which the Project will be built will be acquired by Front Range from a FRH affiliate. As mentioned, the Ft. Lupton site was chosen because it met the PUC criteria of close proximity to existing PSCo supply distribution systems.

In June, 1999, the PUC approved the Power Supply Agreement for the Sale of Electricity Capacity and Energy between PSCo and Front Range. (PUC Order dated June 3, 1999, Decision No. C99-568.) In its order, the PUC acknowledged that the negotiations between Front Range and PSCo had been fair and without preference for any bidder. The PUC found the Front Range Project to be in the "public interest" and that Front Range had received no unfair competitive advantage in the bid process. Id. at 9-11. Specifically, the PUC noted the benefit to consumers because the Front Range Project "is part of the least cost portfolio of generation that was made available to Public Service as a result of the competitive bid process," that "this least cost portfolio has better reliability than the other portfolios closest in total cost," and that the least cost portfolio "contributes lower average emissions in tons/MWH than [Public Service's] existing system." Id. at 8.

The PUC approved the Purchase Price Agreement after reviewing and accepting the report of the independent evaluator. The process ordered by the PUC to maintain separation between Front Range and PSCo to avoid influence and preferential treatment not only established a process by which PSCo and Front Range must deal with each other, but a mind-set of complete independence and autonomy that continues today.

III. Power Purchase Agreements

All of the Project's electrical capacity and energy during the period May 1, 2000 through April 30, 2007, will be sold to PSCo pursuant to a Power Supply Agreement (the "**PSCo PPA**"). The PUC required PSCo to enter into supply agreements requiring new generation facilities to be located near existing PSCo facilities for access to existing distribution systems. The PPA contains provisions that are standard in the industry. Under the PSCo PPA, PSCo must pay Front Range a contracted for amount whether power is discharged or not. These "capacity payments" payable to Front Range are

[2] FRH is a wholly-owned subsidiary of KN Power Company, which is in turn a wholly-owned subsidiary of KN Energy, Inc. No common ownership or control exists between the New Century Energies, Inc. related entities and the KN Energy, Inc. related entities

determined by a net capability, established at 164 megawatts, which is then modified to reflect a 12-month capacity availability factor taking into account planned and unplanned derated hours. Front Range will also receive fixed operation and maintenance payments, and payments for actual energy production. Because of the payment mechanisms, the Project will be economically viable, whether or not PSCo actually takes energy from the Project. PSCo will supply fuel to the facility, directly from its own sources and/or through third parties. It is presently anticipated that fuel will be supplied both by PSCo and through third-party suppliers. Alternative fuel supplies are readily available at the site, should PSCo fail to provide fuel.

For the period May 1, 2007 through April 30, 2015, all of the Project's electrical capacity and energy will be sold to e prime, inc. ("**e prime**"), pursuant to a Power Purchase Agreement (the "**e prime PPA**"). KN Energy, Inc., or its designated affiliate, has an option to acquire 50% of the capacity and energy from the Project under identical terms and conditions to those of the e prime PPA. This option must be exercised no later than April 30, 2002. e prime is a power marketing firm and it will independently market the power it acquires from the Project. PSCo may or may not acquire power pursuant to the e prime PPA, and presently is under no obligation and has no right to do so. e prime is a wholly-owned subsidiary of NC Enterprises, Inc. e prime owns no generation assets, and is engaged primarily in energy related products and services that include, but are not necessarily limited to, electric and gas brokering, marketing and trading, and energy consulting.

The PSCo and e prime PPAs cover only the first 15 years of the Project, which has an expected life of at least 30 years. For the remaining years following the PSCo and/or e prime PPAs, it is expected that Front Range will market electricity to wholesale customers.

Front Range's lenders have employed an independent consulting firm to conduct a market analysis of the Project, assuming that the PSCo PPA and the e prime PPA did not exist. The analysis shows that, because of present market conditions in the electric industry, the Project is economically viable as a merchant plant, without the PSCo PPA or the e prime PPA. Thus, the Project is not economically dependent upon PSCo or e prime.

Both the PSCo PPA and the e prime PPA require Front Range to operate the Project in compliance with all applicable laws and, in particular, laws relating to the environment. Specifically, both agreements prohibit dispatch of the Project in a manner that would cause the Project to exceed NOX and other emissions limitations, as determined pursuant to the air permit. The operating agreement to be entered into with

General Electric Company, the third-party operator of the Project, also contains such protective provisions.

These PPA's contain terms and conditions common to the industry, although somewhat unique to this industry because of the nature of this regulated market. Front Range elected to pursue this Project because of the benefits of the current PPA with PSCo, but also to be well positioned to compete in the marketplace once deregulation occurs.

IV. Discussion of Applicable Guidance and Regulations

Under EPA's regulations, one of the criteria for determining whether two facilities should be treated as a single source is whether they are "under common control of the same person (or persons under common control)."[3] EPA regulations do not define "common control." However, a series of EPA memoranda, letters and other guidance documents issued during the past 20 years have shed light on the factors that might be considered in determining whether two facilities are under "common control." In September 1980, EPA determined that "common control" issues would be made on a "case-by-case" basis. Specifically, EPA stated:

> Control can be a difficult factual determination, involving the power of one business entity to affect the construction decisions or pollution control decisions of another business entity. EPA thought that a simplifying test of control, such as some specified voting share, would serve the interest of the business community, by providing clarity and predictability. Comments on this issue were solicited and suggestions were received. Upon receiving the comments, the Agency did not find a convincing argument in favor of any particular, simplified test of control. . . . Therefore, the Agency has decided that determinations of control will be made case-by-case, without benefit of a voting share test or other simplifying test. However, the Agency will be guided by the general definition of control used by the Securities and Exchange Commission. In SEC considerations of control, control "means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person (or organization or

[3] A "major source" means: "any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person (or persons under common control)) belonging to a single major industrial grouping and that are described in paragraph (1), (2) or (3) of this definition." 40 CFR 70.2; 40 CFR 71.2 (1998). Similarly, under EPA's new source review regulations, a "building, structure, facility, or installation" means: "all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel." 40 CFR 51.166 (1998).

association) whether through the ownership of voting shares, contract, or otherwise." 17 CFR 210.1-02(g).

45 Fed. Reg. 59874, 59878 (September 11, 1980)).

A number of EPA guidance documents have determined that a person with as little as a 50% voting interest can control an entity. [See Letter dated November 2, 1998 from Steven C. Riva to Janet Griffin, Schering-Plough Corporation; Letter dated November 2, 1995 from Jewell A. Harper, EPA Region IV, to Terry C. Harris, Knox County Department of Air Pollution Control; Letter dated July 20, 1995 from Jewell A. Harper, EPA Region IV, to Ron Methier, Georgia Department of Natural Resources. Memorandum dated March 16, 1979 from Edward E. Reich, Division of Stationary Source Enforcement, to Diane Dutton, EPA Region VI). See also Letter dated March 3, 1990 from Douglas M. Skie, EPA Region VII [sic] (should be Region VIII), to Jeffrey T. Chaffee, Montana Department of Health and Environmental Sciences.] The stated rationale is that even though a person with a 50% voting interest could not mandate a decision by the entity, it could have the power to veto a decision regarding the implementation of major emission control measures. Here the issue of control is relevant to the relationship of PSCo to Front Range, or the relationship of QMH to Front Range. Because QMH has only a 49% ownership interest in Front Range, it cannot veto any management decisions by the Manager, and co-member, FRH. Consequently, it cannot be found to "control" by virtue of its ownership interest. Similarly, PSCo owns no interest in Front Range.

EPA has also recognized that a person with no economic ownership interest could nonetheless control an entity if it obtained sufficient voting rights or contractual rights. See Letter dated July 15, 1997 from Cheryl L. Newton, EPA Region IV, to Robert Hodanbosi, Ohio Environmental Protection Agency. This is consistent with the SEC guidance that control might be gained by voting rights or by contract. In this regard, the Front Range Limited Liability Agreement also precludes QMH from having authority with regard to management of the Project. Specifically, FRH is the designated Manager with broad authority to conduct the business affairs of Front Range, included but not limited to decisions relating to compliance with environmental law and control measures.

EPA documents have also identified other criteria to be evaluated to determine if control exists. These criteria, while not individually dispositive of the control issue, may signify the need to look closer at the relationship between the entities to determine if control exists. These criteria include:

- Common workforces, plant managers, security forces, corporate executive officers, or board of directors.

Front Range and PSCo do not share any of these elements.

- Shared equipment, other property or pollution control equipment.

Front Range and PSCo do not share any of these elements.

- Control of management decisions for pollution control.

Neither PSCo or QMH control any management decisions for Front Range with the limited exception that QMH may participate in limited non-environmental decisions .

- Shared payroll, employee benefits, health plans, retirement funds, or other administrative functions.

Front Range and PSCo do not share any of these elements.

- Shared responsibility for compliance with air quality control requirements or violations of such requirements.

Front Range and PSCo do not share this responsibility or liability

- Shared financial arrangements or profits and losses

Front Range and PSCo do not share any financial arrangements including profits or losses

- Dependency of one facility on the other

Front Range and PSCo do not depend on each other for their operations. If either facility did not exist the operations at the other facility could continue.

There are also some guidance documents that indicate that control can be established by contracts for service or product between two entities. For example, the August 5, 1999 letter to Frank Prager from Julie Wrend of the Colorado Department of Public Health and Environment stated that:

> [T]wo sources will be considered under common control where (1) there is a contract for service dedicating the majority of the first source's products or services to the second source; and (2) the first source's economic survival is dependent upon continued operation of the second source
>
> The second factor above requires a case-by-case determination, looking at such factors as whether the relationship between the sources is one of necessity or convenience; whether the terms of the contract create a dependence of the first source upon the second; whether the second source provides the first source with services essential to the first source's continued operation; and whether the first source would be forced to relocate if the second source no longer required the first source's output.

Front Range and PSCo's Ft. Lupton generators will not be dependent on each other for operation. Both will produce the same product (electricity), both can exist independently of each other, and any shutdown or physical impairment to one would not force the other to shut down. There will be no sharing of electricity between Front Range and PSCo's Ft. Lupton generators. Front Range will receive natural gas from PSCo either from PSCo's gas pipeline or from other existing sources of gas at Ft. Lupton. The electricity that will be purchased by PSCo from Front Range will not be used by or at the PSCo Ft. Lupton plant, but will be resold to retail customers. Because Front Range does not support the generation at PSCo's Ft. Lupton facility and could exist independently (or vice versa), there is no showing of control by supply of product. Front Range is located next to PSCo distribution facilities because of the PUC Order which mandated the location to ensure prompt peak load power in the shortest time to avoid future electrical shortages. Under this analysis, there is no question that the PSCo generating facility at Ft. Lupton and Front Range are separate facilities.

Moreover, Front Range is not dependent upon sale of electricity to PSCo. The PSCo PPA is not a contract for service, but creates a buyer/seller relationship by which a product (electricity) is being sold. As the Front Range lenders' independent marketing analyses have indicated, Front Range is a viable Project without the PSCo PPA or the e prime PPA. Front Range would not have to relocate if either or both agreements were terminated. Various sources of gas are available, and there is a viable market for the power to be generated by the Front Range facility at its existing location.

For the following reasons, we submit that PSCo's Ft. Lupton generating facility and the Front Range Project meet the standards articulated in U.S. EPA guidance for separate facilities, and are not under "common control."

- QMH owns a minority interest in the Project and cannot dictate or veto any decisions regarding the Project.

- Under the Front Range Limited Liability Company Agreement, FRH is the sole Manager of the Project and is vested with responsibility for conducting the business of the Project.

- QMH cannot, under the Limited Liability Company Agreement, become the Manager, even if FRH ceased being a member or the manager of the Company. In that event, QMH would be required to sell membership interests to an unaffiliated third party and designate the unaffiliated third party as Manager, with the lender's Independent Engineer operating as Manager in the interim.

- QMH is prohibited from voting upon any matter regarding emission and pollution controls.

- Under the PSCo PPA, PSCo cannot cause FRH to operate in violation of any laws or permit requirements regarding emissions or pollution controls.

- Negotiations between Front Range and PSCo and e prime, respectively, were conducted by FRH. Front Range was selected by an independent evaluator, which was not affiliated with PSCo. The Colorado Public Utility Commission has specifically verified the fairness of the process by which Front Range was selected.

- The location of the Front Range Project was selected because of the PUC criteria that the new generating facilities be located near existing PSCo distribution systems in order to minimize the time needed to provide additional generation.

- The Project will not be dependent upon PSCo's Ft. Lupton generators and the PSCo Ft. Lupton generators will not be dependent upon the Project. Both will produce electricity and will in effect "compete" for provision of electricity to PSCo.

- If PSCo's Ft. Lupton generating facility ceased to exist, it would not cause the Project to fail. The Front Range facility could be said to compete with the PSCo generators such that cessation of power generation from PSCo's existing

Ft. Lupton generators might benefit the Project.Conversely, if Front Range ceased to operate, PSCo's Ft. Lupton generating facility would not be affected.

- The economic viability of Front Range is not dependent upon providing electricity to PSCo.

We submit that there is no common control between PSCo and Front Range, or between QMH and Front Range such that the PSCo generators and the Front Range facility should be viewed as a single source under the Clean Air Act. We believe that the separate source status of these two facilities should allow the synthetic minor construction permit for the Front Range facility to issue so that we may begin construction within a time frame that allows us to fulfill the terms of our PPA with PSCo to provide needed power to the front range as ordered by the PUC.

Sincerely,

Martha E. Rudolph
Assistant General Counsel

AMENDED AND RESTATED
LIMITED LIABILITY COMPANY AGREEMENT

OF

FRONT RANGE ENERGY ASSOCIATES, LLC

TABLE OF CONTENTS

AMENDED AND RESTATED
LIMITED LIABILITY COMPANY AGREEMENT

OF

FRONT RANGE ENERGY ASSOCIATES, LLC
(A Delaware Limited Liability Company)

This Amended and Restated Limited Liability Company Agreement of Front Range Energy Associates, LLC (the "Company") is entered into effective as of September 17, 1999 (the "**Effective Date**"), by and among **Quixx Mountain Holdings, LLC**, a Delaware limited liability company ("**QMH**"), and **FR Holdings, LLC**, a Colorado limited liability company ("**FRH**") as the Members, and FRH, in its capacity as the Manager. This Amended and Restated Limited Liability Company Agreement amends and restates in its entirety the Limited Liability Company Agreement of Front Range Energy Associates, LLC entered into effective as of March 23, 1999.

RECITALS:

The Members have formed a limited liability company to develop, finance, construct, own, operate, and otherwise have a possessory interest, in an electric generating facility (the "**Project**"), and to conduct various activities associated therewith. The Project, which is more particularly described in the Power Supply Agreement, shall be an approximately 163 MW single cycle generating facility, consisting of four GE LM6000 combustion turbine generators, interconnection facilities, and associated equipment, devices, systems and facilities, and personal and real property interests, and will be constructed on property owned by the Company.

The Company will develop and construct the Project pursuant to the requirements of the Power Supply Agreement, pursuant to which the Company will sell to PSCo and PSCo will purchase from the Company, electricity generated by the Project.

NOW, THEREFORE, in consideration of the mutual covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. DEFINITIONS

Capitalized terms used in this Agreement without other definition, including those contained in the Recitals, shall, unless expressly stated otherwise, have the meanings specified in this Article 1, or if not defined herein, in the Power Supply Agreement. The singular

includes the plural and the masculine includes the feminine and neuter, and vice versa. "Includes" or "including" means "including, without limitation." The words "agree," "agreement," "approved," and "consent" shall be deemed to be followed by the phrase "which shall not be unreasonably withheld, conditioned or unduly delayed" except as the context may otherwise specify or require. Except to the extent expressly included in this Agreement, the definitions contained in Section 18-101 of the Act shall not apply to this Agreement.

1.1 "*Accountants*" means one or more firms of nationally recognized certified independent public accountants selected by a Majority in Interest of the Members.

1.2 "*Act*" means the DELAWARE LIMITED LIABILITY COMPANY ACT, as from time to time in effect in the State of Delaware, or any corresponding provision or provisions of any succeeding or successor law of the State of Delaware; provided, however, that any amendment to the Act, or any succeeding or successor law, is applicable to the Company only if the Company has elected to be governed by the Act as so amended or by such succeeding or successor law, as the case may be, and in such event, the term "Act" shall refer to the Act as so amended or to such succeeding or successor law only after the appropriate election by the Company, if made, has become effective.

1.3 "*Adjusted Capital Account Deficit*" means, with respect to any Member, the deficit balance, if any, in such Member's Capital Account as of the end of the relevant fiscal year, after giving effect to the following adjustments.

(a) Such Capital Account shall be deemed to be increased by any amounts which such Member is obligated to restore to the Company (pursuant to this Agreement or otherwise) or is deemed to be obligated to restore pursuant to the second to last sentence of Treasury Regulation sections 1.704-2(g)(1) and 1.704-2(i)(5) (relating to allocations attributable to nonrecourse debt).

(b) Such Capital Account shall be deemed to be decreased by the items described in Treasury Regulation sections 1.704-1(b)(2)(ii)(d)(4), (5) and (6).

The foregoing definition of Adjusted Capital Account Deficit is intended to comply with the provisions of Treasury Regulation section 1.704-1(b)(2)(ii)(d) and shall be interpreted and applied consistently therewith.

1.4 "*Affiliate*" means, when used with reference to a specified Person, any Person that directly or indirectly controls or is controlled by or is under common control with the specified Person. For the purposes of this definition, "control" (including with correlative meanings, the terms "controlling," "controlled by" and "under common control with"), as used with respect to any Person shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of

such Person, whether through the ownership of voting securities or by contract or otherwise.

1.5 "*Agreement*" means this Amended and Restated Limited Liability Company Agreement of Front Range Energy Associates, LLC, as originally executed and as amended, modified or supplemented from time to time.

1.6 "*Appraisal*" means, unless the context indicates otherwise, a written valuation report by an Appraiser that describes and values the fair market value of an Interest in the Company, or specific Company Property, as the case may be.

1.7 "*Appraiser*" means a person or firm qualified to perform business Appraisals of limited liability companies and ownership interests in limited liability companies, or specific Company Property.

1.8 "*Article*" means an Article of this Agreement.

1.9 "*Assignee*" means the transferee pursuant to an assignment or Transfer, whereby the Assignee is not substituted as a Member in the Company. An Assignee has only the rights granted under Section 18-702(b)(2) of the Act. An Assignee or transferee does not have the right to become a Member or participate in the management, business and affairs of the Company except as provided in this Agreement.

1.10 "*Bankruptcy*" means, with respect to a Member:

(a) an adjudication that it is bankrupt or insolvent, or the entry of an order for relief under the FEDERAL BANKRUPTCY CODE or any other applicable bankruptcy or insolvency statute or law;

(b) its inability to pay its debts generally as they mature (after giving effect to the applicable grace periods);

(c) the making by it of an assignment for the benefit of creditors or the dissolution and winding up of its affairs;

(d) the filing by it of a petition in Bankruptcy or a petition for relief under any section of the FEDERAL BANKRUPTCY CODE or any other applicable Bankruptcy or insolvency statute or law or any answer or other pleading admitting or failing to deny the allegation of any such petition;

(e) the filing against it of any such petition (unless such petition is dismissed within one hundred twenty (120) days from the date of filing thereof);

(f) its seeking, consenting to, or acquiescence in the appointment of a trustee, conservator, receiver, or liquidator for it or for all or any substantial part of its assets;

(g) the appointment without its consent or acquiescence of a trustee, conservator, receiver, or liquidator for it or for all or any substantial part of its assets (unless such appointment is vacated or stayed within one hundred twenty (120) days of its effective date); or

(h) the acquisition by a creditor of a Member, or by any other Person acting on behalf of such creditor, of any rights with respect to the Member's Interest in the Company or to Profits (other than by the voluntary grant of such rights by the Member), if such acquisition shall continue for a period of one hundred twenty (120) days.

1.11 "*Book Value*" means, with respect to any asset of the Company, the asset's adjusted basis as of the relevant date for federal income tax purposes, except as follows:

(a) The initial Book Value of any asset contributed by a Member to the Company shall be the gross fair market value of such asset;

(b) The Book Values of all Company assets shall be adjusted to equal their respective gross fair market values as of the following times: (i) the acquisition of an additional interest in the Company by any new or existing Member in exchange for more than a *de minimis* Contribution; (ii) the distribution by the Company to a Member of more than a *de minimis* amount of Company assets as consideration for an interest in the Company; and (iii) the liquidation of the Company within the meaning of Treasury Regulation Section 1.704-1(b)(2)(ii)(g); provided, however, that adjustments pursuant to clauses (i) and (ii) above shall be made only if the Majority in Interest of Members determine that such adjustments are necessary or appropriate to reflect the relative economic interests of the Members in the Company;

(c) The Book Value of any Company asset distributed to any Member shall be the gross fair market value of such asset on the date of distribution; and

(d) The Book Values of Company assets shall be increased (or decreased) to reflect any adjustments to the adjusted basis of such assets pursuant to Code Section 734(b) or Code Section 743(b), but only to the extent that such adjustments are taken into account in determining capital accounts pursuant to Treasury Regulation Section 1.704-1(b)(2)(iv)(m); provided, however, that Book Values shall not be adjusted pursuant to this subsection ((d)) to the extent the Majority in Interest of Members determine that such adjustment pursuant to subsection ((b)) hereof is necessary or appropriate in connection with a transaction that would otherwise result in an adjustment pursuant to this subsection ((d)).

If the Book Value of an asset has been determined or adjusted pursuant to subsection ((a)), ((b)) or ((d)) hereof, such Book Value shall thereafter be adjusted by the Depreciation taken into account with respect to such asset for purposes of computing Profits and Losses.

The foregoing definition of Book Value is intended to comply with the provisions of Treasury Regulation Section 1.704-1(b)(2)(iv) and shall be interpreted and applied consistently therewith. Any determinations of "gross fair market value" in this definition of Book Value shall be made by a Majority in Interest of Members.

1.12 "*Business Day*" means any day other than a Saturday, Sunday, or other day on which banks are closed in New York, New York or Denver, Colorado.

1.13 "*Capital Account*" has the meaning given to it in Section 3.1.

1.14 "*Cash Flow*" means, for any period, the amount, computed on a cash basis, of the following:

(a) the sum of (i) gross receipts, all investment income of the Company, and all cash received by the Company from other sources, and (ii) any amounts released from Reserves, reduced by:

(b) the sum of (i) disbursements of the Company in connection with the development and construction of the Project, including any payments or reimbursements to Members for development services or costs, (ii) disbursements of the Company for operating and administrative expenses (including payments under any agreements to which the Company is a party), expenditures for capital investments and reinvestments, principal payments on debt, interest and other expenses, including any debt repayments required or elected to be made in connection with any refinancing, sale or other event, and (iii) any increase in Reserves; provided that (i) the Initial Company Disbursement and (ii) any cash received, expenses incurred and disbursements made with respect to the liquidation of the Company shall not be taken into account in computing Cash Flow.

1.15 "*Closing Date*" means the date on which the Company first receives funds from the construction financing of the Project, pursuant to the Financing Documents.

1.16 "*Code*" means the Internal Revenue Code of 1986, as amended from time to time.

1.17 "*Commercial Operation Date*" has the meaning given to it in the Power Supply Agreement.

1.18 "*Company*" means the limited liability company formed under this Agreement, as initially constituted or as amended.

1.19 "*Company Documents*" means all agreements to which the Company is a party, or with respect to which the Company has approval or consent rights, including Material Contracts.

1.20 "*Conciliators*" has the meaning given to it in Section 6.8((a))(1).

1.21 "*Consent*" or "*Approval*" or "*Vote of a Person*" means the prior written consent, approval or vote of the indicated Person to the action requested. Unless otherwise provided, the Consent, Vote or Approval of the Members shall mean the Consent, Vote, or Approval of a Majority in Interest of the Members.

1.22 "*Consents*" means a consent and agreement of a Person with respect to the assignment by the Company of the Company's rights and interests under each Material Contract entered into by the Company with such Person as security pursuant to the Financing Documents.

1.23 "*Construction Contract*" means the agreement between the Company and a third-party contractor for the design and construction of the Project, as amended from time to time.

1.24 "*Construction Period Budget*" has the meaning given to it in Section 6.9(a)(1)(B).

1.25 "*Contribution*" means money and any other Property that a Member contributes to the Company in its capacity as a Member pursuant to Section 3.2 or Section 3.3.

1.26 "*Depreciation*" means for each fiscal year or part thereof, an amount equal to the depreciation, amortization, or other cost recovery deduction allowable for federal income tax purposes with respect to an asset for such year or other period, except that if the Book Value of an asset differs from its adjusted basis for federal income tax purposes at the beginning of such year, Depreciation shall be an amount which bears the same ratio to such Book Value as the federal income tax depreciation, amortization or other cost recovery deduction for such year bears to such adjusted tax basis; provided, however, if the Federal Income Tax depreciation, amortization, or other cost recovery deduction for such year is equal to zero, depreciation shall be determined with reference to such Book Value using a reasonable method selected by a Majority in Interest of Members.

1.27 "*Funding Agreement*" means the Funding Agreement to be entered into between the Company, FRH and QMH.

1.28 "*Development Period*" means the period commencing on the date established by the Unanimous Consent of Members, and terminating on the earlier to occur of the Closing Date or the date that the Project is abandoned or otherwise terminated by the Company.

1.29 "*Development Period Budget*" has the meaning given to it in Section 6.9(a)(1)(A).

1.30 "*e-prime Power Supply Agreement*" means the Power Supply Agreement entered into between the Company and e-prime, Inc., a Colorado corporation, as amended from time to time.

1.31 "*Effective Date*" has the meaning given to it in the introductory paragraph of this Agreement.

1.32 "*Eligible Facility*" means an "eligible facility" as defined under PUHCA.

1.33 "*Exempt Wholesale Generator*" means an "exempt wholesale generator" as defined under PUHCA.

1.34 "*FERC*" means the Federal Energy Regulatory Commission.

1.35 "*Financing Documents*" has the meaning given to it in the Power Supply Agreement.

1.36 "*GAAP*" means generally accepted accounting principles.

1.37 "*Independent Engineer*" means an independent engineering firm selected by the Members pursuant to Section 6.8((b)).

1.38 "*Initial Company Disbursement*" means the amount payable to the Company on the Closing Date pursuant to the initial disbursement schedule approved by the Senior Lender and contained in the Financing Documents, and distributable to the Members pursuant to Section 5.1 of this Agreement.

1.39 "*Interconnection Agreement*" means the Agreement to be entered into between the Company and PSCo with respect to the interconnection of the Project with PSCo's electric system, as amended from time to time.

1.40 "*Interest*" or "*Membership Interest*" means, in the context of "a Member's Interest," the entire legal and equitable ownership interest of a Member in the Company at any particular time, including, without limitation, the respective Member's interest in the capital, income, gain, losses, deductions, expenses, and management of the Company granted by this Agreement.

1.41 "*IRS*" means the Internal Revenue Service or any successor thereto.

1.42 "*Liquidator*" has the meaning given to it in Section 11.5((b)).

1.43 "*FRH*" has the meaning given to it in the Recitals.

1.44 "*KN Energy*" means KN Energy, Inc., or KN Power Company, and their successors and subsidiaries. For purposes of this Agreement and for the avoidance of doubt, the term KN Energy also includes, following any merger, takeover, sale of a controlling interest of, or other corporate reorganization involving KN Energy, Inc. or KN Power Company, any ultimate parent of any of them, any new entity following a merger or any other successor to any of them following such a reorganization, and any subsidiary or subsidiary of a subsidiary thereof.

1.45 "*Majority In Interest of Members*" means those Members whose Sharing Ratios aggregate more than 50 percent of the Sharing Ratios of all Members.

1.46 "*Manager*" means FRH or any permitted successor to FRH as Manager of the Company.

1.47 "*Market Rate Approval*" means an order from the FERC or successor governmental authority (a) approving the Company's authority to sell electrical energy and capacity in accordance with the Power Supply Agreement; (b) waiving certain of FERC's regulations under the Federal Power Act; and (c) granting blanket approvals under certain other FERC regulations.

1.48 "*Material Contracts*" means the Company Funding Agreement, Financing Documents, Power Supply Agreement, e-prime Power Supply Agreement, Construction Contract, O&M Contract, Interconnection Agreement, Turbine Contract, and all Consents entered into with respect to any such agreement.

1.49 "*Member(s)*" means QMH and FRH, or any Person who, at the time of the reference thereto, has been admitted to the Company as a successor to the duties or interest of QMH or FRH, or as a replacement Member as provided herein, or as an additional Member, in any such Person's capacity as a Member, and in any case, only so long as such Person has not ceased to be a Member hereunder. At all times when there is only one Member, all references in this Agreement to the "Member" shall be deemed to refer to the sole Member and any and all actions requiring the Consent or Approval of all Members may be taken by the sole Member.

1.50 "*Member Indemnitee*" has the meaning given to it in Section 6.10((a)).

1.51 "*NCE*" means New Century Energies, Inc., Southwestern Public Service Company, Public Service Company of Colorado, and their successors and subsidiaries. For purposes of this Agreement and for the avoidance of doubt, the term "NCE" also

includes, following any merger, takeover, sale of a controlling interest of, or other corporate reorganization involving New Century Energies, Inc., Southwestern Public Service Company, or Public Service Company of Colorado, any ultimate parent of any of them, any new entity following a merger or any other successor to any of them following such a reorganization, and any subsidiary or subsidiary of a subsidiary thereof.

1.52 "*O&M Contract*" means the contract to be entered into between the Company and a third party providing for the operation and maintenance of the Project, as amended from time to time.

1.53 "*Operating Period Budget*" has the meaning given to in Section 6.9((a))((1))((C)).

1.54 "*Permitted Member Loan*" has the meaning given to it in Section 3.3((d))((2)).

1.55 "*Person*" means any individual, limited liability company, partnership, corporation, association, business, trust, government or political subdivision thereof, governmental agency or other entity.

1.56 "*Power Supply Agreement*" means the Power Supply Agreement entered into between the Company, as Seller, and PSCo, as Buyer, as amended from time to time.

1.57 "*Prime Rate*" means the Prime Rate published by The Wall Street Journal in its money rate section, from time to time, which is also the base rate on corporate loans at large United States money center commercial banks. If The Wall Street Journal ceases to publish a Prime Rate, then the Prime Rate shall be the reference rate announced from time to time by a national banking association selected by the Manager. The Prime Rate shall change upon the effective date of any change in the Prime Rate by The Wall Street Journal (or its substitute), as the case may be.

1.58 "*Profits*" and "*Losses*" means, for each Year or other applicable period, the Company's taxable income or loss for such period determined in accordance with Code section 703(a) (for this purpose, all items of income, gain, loss or deduction required to be stated separately pursuant to Code section 703(a)(1) shall be included in taxable income or loss) with the following adjustments:

(a) Any income of the Company that is exempt from federal income tax, and not otherwise taken into account in computing Profits or Losses pursuant to this definition, shall be added to such taxable income or loss.

(b) Any expenditures of the Company described in Code section 705(a)(2)(B) or treated as such pursuant to Treasury Regulation section 1.704-

(1)(b)(2)(iv)(i), and not otherwise taken into account in computing Profits or Losses pursuant to this definition, shall be subtracted from such taxable income or loss.

(c) Depreciation for such period shall be taken into account in lieu of the depreciation, amortization and other cost recovery deductions taken into account in computing such taxable income or loss.

(d) Gain or loss resulting from any disposition of Company Property with respect to which gain or loss is recognized for federal income tax purposes shall be computed with reference to the Book Value of the Property disposed of, rather than the adjusted tax basis of such Property.

(e) In the event the Book Value of any Company asset is adjusted pursuant to Subsection (b), (c) or (d) of the definition of Book Value set forth above in Section 1.11, the amount of such adjustment shall be taken into account as gain or loss from the disposition of such asset for the purpose of computing Profits and Losses.

(f) Such taxable income or loss shall not be deemed to include items of income, gain, loss, deduction and Code section 705(a)(2)(B) expenditures allocated pursuant to Sections 4.2((b))((1))((A)), 4.2((b))((1))((B)), 4.2((b))((1))((D)) or 4.2((b))((1))((E)) (relating to allocations caused by the occurrence of deficit Capital Account balances or the presence of nonrecourse debt).

(g) Such taxable income or loss shall not be deemed to include the Company's non-recourse deductions, within the meaning of Treasury Regulation Section 1.704-2.

1.59 "*Prohibited Utility Status*" means the status of a Person that is or may be (a) deemed by a governmental authority having jurisdiction under PUHCA to be, except as an Exempt Wholesale Generator, an "electric utility company," an "electric utility holding company," a "holding company," a "subsidiary company" of a "holding company," or an "affiliate" of a "holding company" as those terms are used in PUHCA; (b) deemed by FERC to be a "public utility," as such term is used in the Federal Power Act that is not eligible for Market Rate Approval; or (c) deemed by any comparable state or local governmental authority of appropriate jurisdiction to be any similar entity subject to regulation (or not exempt from regulation) under any other state or local regulation comparable to PUHCA or the Federal Power Act in any manner which is more adverse to the Company than the regulation under PUHCA as an Exempt Wholesale Generator and the regulation by FERC under the Market Rate Approval.

1.60 "*Project*" has the meaning set forth in the Recitals.

1.61 "*Property*" means all real property, personal property, and other assets of any nature whatsoever, which have been contributed to or acquired by the Company and all increases and decreases applicable to the Property.

1.62 "*PSCo*" means Public Service Company of Colorado, a Colorado corporation.

1.63 "*PUHCA*" means the Public Utility Holding Company Act of 1935 (15 U.S.C.A. § 79, et. seq.) and the regulations promulgated thereunder, each as amended from time to time.

1.64 "*Purchase Event*" means:

(a) For an individual Member (if permitted): Bankruptcy; death; any disabling mental or physical condition which continues for an uninterrupted period of more than six months; entry of an order adjudicating the Member incompetent by a court of competent jurisdiction; appointment of a conservator; or execution of a certificate diagnosing the Member's incompetency by a physician licensed to practice medicine in the State of the Member's residence.

(b) For a Member that is an entity: Bankruptcy and the occurrence of any of the following events, unless any such events occur pursuant to a merger or other reorganization of such Member:

(1) filing of a certificate of dissolution or its equivalent for any corporation;

(2) dissolution of a partnership or limited liability company, if the entity is to be wound up and liquidated and not continued;

(3) termination of a trust;

(4) the dissolution and termination of any other entity that is a Member, whether voluntary or involuntary.

1.65 "*Purchase Option member*" has the meaning given to it in Section 9.6.

1.66 "*Purpose* or *Purposes*" has the meaning given to it in Section 2.5.

1.67 "*QMH*" has the meaning given to it in the Recitals.

1.68 "*Regulatory Allocations*" has the meaning given to it in Section 4.2((b))((1))((F)).

1.69 "*Reserves*" means the reserves established and maintained from time to time for current and future operating and working capital and to pay taxes, insurance, debt service, debt amortization, repairs, replacements or renewals, or other costs and expenses incident to the Company's business, or for any other Company Purposes, including reserves for capital expenditures and unforeseen or contingent liabilities, debts or obligations.

1.70 "*Section*" means a section of this Agreement, unless the context requires otherwise.

1.71 "*Selling Member*" has the meaning given to it in Section 9.4.

1.72 "*Sharing Ratio*" means the amount (expressed as a percentage) which shall be utilized to measure certain aspects of a Member's Interest in the Company. The Members' initial respective Sharing Ratios are specified in Schedule A and incorporated herein by this reference.

1.73 "*Tax Matters Member*" has the meaning set forth in Section 7.6((d)).

1.74 "*Transfer*" means, in the context of a "Transfer of" an Interest, a sale, assignment, gift, transfer, hypothecation, pledge or other disposition (whether as security or otherwise) of all or part of such Interest. The transferee of an Interest, pursuant to a permitted Transfer, shall have the status only of an Assignee, unless made a substituted Member in accordance with the terms and conditions of this Agreement; provided, however, that a pledge, hypothecation, mortgage or collateral assignment by any of the Members of their respective Membership Interests to a Senior Lender shall not be deemed to be a transfer; provided further, however, that the foreclosure or realization on such Membership Interests by such Senior Lender would be deemed to be a "Transfer." For purposes hereof, a sale, assignment, gift, transfer, hypothecation, pledge, or other disposition of any ownership interest in a Member, the addition of additional equity owners of a Member or the amendment of any of the organizational documents of a Member shall not be deemed to constitute a transfer of the Interest of such Member.

1.75 "*Treasury Regulations*" means the regulations issued by the Treasury Department pursuant to the Code.

1.76 "*Turbine Contract*" means the contract entered into between Front Range Energy Associates, LLC, as Buyer, and General Electric Company, or one or more of its affiliates, as Seller, as amended from time to time.

1.77 "*Unanimous Consent*" or "*Unanimous Consent of Members*" means the Consent of all Members.

1.78 "*Year*" means the calendar year or such other fiscal period for the Company as is selected pursuant to Section 7.1.

2. FORMATION AND BUSINESS OF THE COMPANY

2.1 **Formation.** The Members have formed this Company in accordance with the provisions of this Agreement and pursuant to the Act.

2.2 **Name.** The name of the Company is Front Range Energy Associates, LLC.

2.3 **Existence and Term.** The Company's existence commenced as of the date the Company's Certificate of Formation was filed in accordance with the Act. The Company shall continue, unless earlier dissolved in accordance with the provisions of Article 11, until the later to occur of (a) the termination of the Power Supply Agreement, the e-prime Power Supply Agreement, and any substitute or additional power supply agreements, or any extensions or renewals thereof, or (b) the cessation of the Company to own or operate the Project for a commercial purpose.

2.4 **Place of Business.** The principal office and place of business of the Company may be established from time to time by a Majority in Interest of the Members. The Company shall maintain a registered office in Delaware to the extent required by the Act.

2.5 **Purposes.** The purposes for which the Company is organized are:

(a) **General.** To (i) develop, finance and refinance, construct, own, operate, and maintain the Project, (ii) generate, deliver and sell electricity from the Project, and (iii) lease, sell, dispose of and otherwise deal with the Project and any other Company Property.

(b) **Incidental Activities.** To do any and all things and perform any and all acts incidental to, necessary, appropriate or advisable in connection with the foregoing.

2.6 **Other Activities of the Members.** The Members, the Manager, and their Affiliates may at any time and from time to time engage in and possess interests in other business ventures and activities of any and every type and description, independently or with others, whether such ventures are competitive with the Company or the Project. Neither the Manager, the Company nor any other Member shall by virtue of this Agreement have any right, title, or interest in or to such independent ventures and activities or to the income or profits derived therefrom, nor shall engaging in such ventures and activities constitute a breach of its obligations hereunder. The Members, the Manager and their officers and directors, shall not be obligated to devote their entire efforts to the business of the Company.

2.7 **Filings.** The Manager shall cause the Company to take any actions and file any documents and instruments reasonably necessary to perfect and maintain the Company as a limited liability company. Further, the Manager shall cause to be executed, filed and published all certificates, notices, statements or other instruments and amendments thereto under the laws of the State of Delaware and other applicable jurisdictions as are necessary or advisable for the operation of the Company and the limited liability status of each Member.

2.8 **No Creation of State Law Partnership.** Except for federal and state tax purposes, and only for such purposes, the Members intend that the Company not be treated as or construed as a partnership, and that no Member be considered to be a partner of any other Member, and this Agreement is not to be otherwise construed. It is further the intention of the Members that the debts, obligations, and liabilities of the Company, whether arising in contract, tort, or otherwise, are solely the debts, obligations and liabilities of the Company; and no Member of the Company is personally obligated for a debt, obligation, or liability of the Company solely by reason of being a Member.

3. CAPITALIZATION

3.1 **Capital Accounts.**

(a) **Establishment.** A separate capital account ("**Capital Account**") shall be maintained for each Member.

(b) **Capital Account Balances.** The opening Capital Account balance of each Member shall be equal to the amount for such Member set forth in Section 3.2, and such Capital Account shall thereafter be further adjusted with respect to subsequent events as follows:

(1) *increased by*:

(A) the aggregate amount of such Member's cash Contributions to the Company;

(B) the Book Value of Property contributed by such Member to the Company, net of liabilities secured by such Property that the Company is considered to assume or take subject to under Code Section 752;

(C) Profits and items of income and gain allocated to such Member pursuant to Section 4.2;

(D) The amount of any liabilities of the Company which are considered to be assumed by such Member for purposes of Treasury Regulation Section 1.704-1(b) and which are not otherwise taken into account under this Section 3.1((b)); and

(E) any positive adjustment to such Member's Capital Account by reason of an adjustment to the Book Value of the Company assets pursuant to Section 3.1((c))((1)); and

(2) *decreased by:*

(A) cash distributions to such Member from the Company;

(B) the Book Value of Property distributed in kind to such Member, net of liabilities secured by such Property that such Member is deemed to assume or take subject to under Code Section 752;

(C) Losses and items of loss or deductions allocated to such Member pursuant to Section 4.2;

(D) The amount of any liabilities of such Member which are considered as assumed by the Company for purposes of Treasury Regulation Section 1.704-(1)(b) and which are not otherwise taken into account pursuant to this Section 3.1((b)); and

(E) any negative adjustment to such Member's Capital Account by reason of an adjustment to the Book Value of Company assets pursuant to Section 3.1((c))((1)).

(c) **Special Rules.**

(1) *Adjustment for Change in Book Value.* If the Book Values of Company assets are adjusted, as provided in the definition of Book Value in Section 1.11, the Capital Accounts of all Members shall be adjusted simultaneously to reflect the aggregate net adjustment as if the Company recognized gain or loss equal to the amount of such aggregate net adjustment and such gain or loss were allocated to the Members in the manner required by Section 4.2.

(2) *Intent to Comply with Treasury Regulations.* This Section 3.1 and the other provisions of this Agreement relating to the maintenance of Capital Accounts are intended to comply with Treasury Regulation Section 1.704-1(b), and shall be interpreted and applied in a manner consistent with such regulations. To the extent such provisions are inconsistent with such regulations or are incomplete with respect thereto, the Capital Accounts of the Members shall be maintained in accordance with such regulations.

3.2 **Mandatory Capital Contributions and Capital Accounts.**

(a) **Members.** The Members have made, or agree to make, as indicated on Schedule A, the Contributions described on Schedule A.

3.3 **Subsequent Capital Contributions, Loans and Withdrawals of Capital.**

(a) **General.** Except as provided in Section 3.3((b)), and except to the extent that Section 18-6.07(b) of the Act provides otherwise, no Person may require any Member to make any additional Contributions to the Company. The Manager may ask (but may not require) the Members to make additional Contributions for any Company Purpose, and each Member may make the additional Contributions with the Unanimous Consent of the Members, but only if all Members are given the opportunity to make Contributions in proportion to their Sharing Ratios. The Capital Accounts of the Members making additional Contributions will be credited in the respective amounts of such Contributions, and the Sharing Ratios of the Members shall be immediately and appropriately adjusted to reflect any such additional Contributions.

(b) **Mandatory Additional Capital Contributions.** Each Member shall make additional Contributions to the Company as and when required pursuant to the terms of the Funding Agreement, and Capital Contributions Approved by the Manager and the Members, by Unanimous Consent.

(c) **Amendment of Schedule A.** Schedule A shall be amended from time to time, as appropriate, by the Manager, to reflect additional Contributions of the Members, changes in the Members' Sharing Ratios, and the admission of additional Members to the Company.

(d) **Loans.**

(1) **General Rule.** No Member shall be required to lend or advance any money to or for the benefit of the Company.

(2) **Permitted Loans.** If (A) the Company's funds are insufficient to meet its operating costs, expenses, obligations or liabilities, and (B) the necessary financing is not reasonably obtainable from third parties in amounts or on terms which are satisfactory to the Manager, the Members may, at the request of the Manager (but shall be under no obligation to) lend all or a portion of the amount of needed funds to the Company on either a long-term or short-term basis (a "**Permitted Member Loan**"). If more than one Member desires to loan or advance funds to the Company pursuant to this Section 3.3((d))((2)), each such Member shall be entitled to provide to the Company such proportion of the necessary funds as such Member's Sharing Ratio bears to the Sharing Ratios of the other Members who desire to participate. Any such loans shall (V) be unsecured, (W) provide for repayments to be applied first to accrued interest and then to principal, (X) provide for repayment at the earliest possible time solely out of funds available for distribution pursuant to the terms of this Agreement and prior to any distributions to the Members, and (Y) bear interest at a rate equal to the Prime Rate plus two percent (2%) (which rate of interest shall in any event not be in excess of the maximum rate permitted by applicable law).

3.4 **No Interest on Capital Account Balances.** No Member shall be entitled to receive any interest on the balance in its Capital Account.

3.5 **Return of Capital Contribution.** Except as specifically provided in this Agreement, no Member has the right to require the return of all or any part of its Contribution or Capital Account balance, or to require a distribution of any Property from the Company prior to the termination and liquidation of the Company.

4. PROFITS AND LOSSES

4.1 **Introduction.** Article 4 generally sets forth the rules for book and tax allocations to the Members. Section 4.2 sets forth the allocations of "book" Profits, Losses and similar items, determined in accordance with the method of accounting set forth in Section 7.2 (which is based on federal income tax principles as adjusted by the partnership allocation rules set forth in Treasury Regulation Section 1.704-1(b), rather than GAAP). Section 4.3 sets forth the manner in which items of income, gain, loss, deduction, credits and basis therefor will be allocated to the Members for income tax purposes to the extent such items may be allocated differently from the book allocations.

4.2 **Book Allocations.** Section 4.2((a)) sets forth the general rule for book allocations to the Members. Section 4.2((b)) sets forth various special rules which modify or clarify the general rules of Section 4.2((a)).

(a) **General Rule.** Profits and Losses of the Company shall be allocated to the Members in accordance with their respective Sharing Ratios.

(b) **Special Rules.** Notwithstanding the general allocation rule set forth in Section 4.2((a)), the following special allocation rules shall apply under the circumstances described therein.

(1) *Deficit Capital Account and Nonrecourse Debt Rules.* The special rules in this Section 4.2((b))((1)) apply, in the following order, to take into account the possibility of Members having deficit Capital Account balances for which they are not economically responsible and the effect of the Company or any partnership in which the Company is a partner incurring nonrecourse debt.

(A) Company Minimum Gain Chargeback. If there is a net decrease in partnership minimum gain during any Year, determined in accordance with the tiered partnership rules of Treasury Regulation Section 1.704-2(k), each Member shall be allocated items of income and gain for such Year (and if necessary, subsequent Years), in proportion to, and to the extent of, an amount equal to such Member's share of the net decrease in partnership minimum gain within the meaning of Treasury Regulation Section 1.704-2(g)(2), except to the extent not required by Treasury Regulation Section 1.704-2(f). To the extent that this Section 4.2((b))((1))((A)) is inconsistent with Treasury

Regulation Sections 1.704-2(f) or 1.704-2(k) or incomplete with respect to such regulations, the minimum gain chargeback provided for herein shall be applied and interpreted in accordance with such regulations.

(B) Member Minimum Gain Chargeback. If there is a net decrease in partner nonrecourse debt minimum gain attributable to a partner nonrecourse debt during any Year, within the meaning of Treasury Regulation Section 1.704-2(i)(2), each Member who has a share of the partner nonrecourse debt minimum gain attributable to such partner nonrecourse debt, determined in accordance with Treasury Regulation Section 1.704-2(i)(5), shall be allocated items of income and gain for such Year (and, if necessary, subsequent Years) in proportion to, and to the extent of an amount equal to such Member's share of the net decrease in partner nonrecourse debt minimum gain. To the extent that this Section 4.2((b))((1))((B)) is inconsistent with Treasury Regulation Section 1.704-2(i) or 1.704-2(k) or incomplete with respect to such regulations, the partner nonrecourse debt minimum gain chargeback provided for herein shall be applied and interpreted in accordance with such regulations.

(C) Limitation on Loss Allocations. The Losses allocated to any Member pursuant to Section 4.2((a)) with respect to any Year shall not exceed the maximum amount of Losses that can be so allocated without causing such Member to have an Adjusted Capital Account Deficit at the end of such Year. All Losses in excess of the limitation set forth in this Section 4.2((b))((1))((C)) shall be allocated first, to those Members who are not subject to this limitation, in proportion to their Sharing Ratios with respect to the applicable period or event giving rise to the Losses, (but losses shall not be allocated to a Member to the extent that such allocation would cause such Member to have an Adjusted Capital Account Deficit) and second, any remaining amount to the Members in the manner required by the Code and Treasury Regulations.

(D) Deficit Account Chargeback and Qualified Income Offset. If any Member has an Adjusted Capital Account Deficit at the end of any Year, including an Adjusted Capital Account Deficit for such Member caused or increased by an adjustment, allocation or distribution described in Treasury Regulation Sections 1.704-1(b)(2)(ii)(d)(4), (5) or (6), such Member shall be allocated items of income and gain (consisting of a pro rata portion of each item of Company income, including gross income and gain) in an amount and manner sufficient to eliminate such Adjusted Capital Account Deficit as quickly as possible.

(E) Member Nonrecourse Deductions. Any partner nonrecourse deductions for any Year or other period shall be allocated to the Member who bears the economic risk of loss with respect to the partner nonrecourse debt to which such partner nonrecourse deductions are attributable in accordance with Treasury Regulation Sections 1.704-2(i) and 1.704-2(k).

(F) Curative Allocations. The allocations provided for in Section 4.2((b))((1))((A)), 4.2((b))((1))((B)), 4.2((b))((1))((C)), 4.2((b))((1))((D)) and 4.2((b))((1))((E)) above (the "**Regulatory Allocations**") are intended to comply with certain requirements of Treasury Regulations Sections 1.704-1 and 1.704-2, and may not be consistent with the manner in which the Members intend to divide Company Profits, Losses and similar items. Accordingly, to the extent necessary (after taking into account anticipated reversing Regulatory Allocations) Profits, Losses and other items will be reallocated among the Members (in the same Year, and to the extent necessary, subsequent Years) in a manner consistent with Treasury Regulation Sections 1.704-1(b) and 1.704-2 so as to prevent the Regulatory Allocations from distorting the manner in which Company Profits, Losses and other items are intended to be allocated among the Members pursuant to Section 4.2((a)).

(G) Change in Regulations. If the Treasury Regulations incorporating the Regulatory Allocations are hereafter changed or if new Treasury Regulations are hereafter adopted, and such change or new regulations, in the opinion of independent recognized tax counsel for the Company, make it necessary to revise the Regulatory Allocations or provide further special allocation rules in order to avoid a significant risk that a material portion of any allocation set forth in this Article 4 would not be respected for federal income tax purposes, this Agreement shall be amended (with the Consent of a Majority in Interest of the Members, which consent shall not be unreasonably withheld) in such a manner as, in the opinion of such counsel, is necessary or desirable, taking into account the interests of the Members as a whole and all other relevant factors, to avoid or reduce significantly such risk to the extent possible without materially changing the amounts distributable to any Member pursuant to this Agreement.

(2) *Change in Members' Interests.* If there is a change in any Member's share of the Company's Profits, Losses or other items during any Year, allocations among the Members shall be made in accordance with their Interests in the Company from time to time during such Year in accordance with Code Section 706, using the closing-of-the-books method, except that Depreciation, amortization and similar items shall be deemed to accrue ratably on a daily basis over the entire Year during which the corresponding asset is owned by the Company for the entire Year, and over the portion of a Year after such asset is placed in service by the Company if such asset is placed in service during the Year.

(3) *Nonrecourse Debt Sharing.* For purposes of this Agreement, the Members shall be deemed to be allocated each Year nonrecourse deductions, within the meaning of Treasury Regulation Section 1.704-2, in proportion to their Sharing Ratios. Solely for the purpose of determining a Member's proportionate share of the "excess nonrecourse liabilities" of the Company within the meaning of Treasury Regulation Section 1.752-3(a)(3), the Members' interests in Company Profits are their Sharing Ratios.

4.3 **Tax Allocations.**

(a) **Generally.** Except as set forth in Section 4.3((b)), allocations for tax purposes of items of income, gain, loss and deduction, and credits and basis therefor, shall be made in the same manner as allocations for book purposes as set forth in Section 4.2. Allocations pursuant to this Section 4.3 are solely for purposes of federal, state and local income taxes and shall not affect, or in any way be taken into account in computing, any Member's Capital Account or share of Profits, Losses, other items or distributions pursuant to any provision of this Agreement.

(b) **Special Rules.**

(1) *Elimination of Book/Tax Disparities.* If any Company Property has a Book Value different than its adjusted tax basis to the Company for federal income tax purposes (whether by reason of the Contribution of such property to the Company, the revaluation of such property hereunder, or otherwise), allocations of taxable income, gain, loss and deduction under this Section 4.3 with respect to such asset shall take account of any variation between the adjusted tax basis of such asset for federal income tax purposes and its Book Value in the manner prescribed by Code Section 704(c) and Treasury Regulation Section 1.704-3(c).

(2) *Allocation of Items Among Members.* Each item of income, gain, loss, deduction and credit and all other items governed by Code Section 702(a) shall be allocated among the Members in proportion to the allocation of Profits, Losses and other items to such Members hereunder, provided that any gain recognized from any disposition of a Company asset which is treated as ordinary income because it is attributable to the recapture of any Depreciation or amortization shall be allocated among the Members in the same ratio as the prior allocations of Profits, Losses or other items which included such Depreciation or amortization, but not in excess of the gain otherwise allocable to each Member.

(c) **State and Local Items.** Items of income, gain, loss, deduction, credit and tax preference for state and local income tax purposes shall be allocated to and among the Members in a manner consistent with the allocation of such items for federal income tax purposes in accordance with the foregoing provisions of this Article 4.

(d) **Conformity of Reporting.** The Members are aware of the income tax consequences of the allocations made by this Section 4.3 and hereby agree to be bound by the provisions of this Section 4.3 in reporting their shares of Company income, gain, loss, deduction, credits and other items for income tax purposes, except in the case of manifest error.

5. DISTRIBUTIONS

5.1 **Distribution of Initial Company Disbursement.** The Initial Company Disbursement (other than any accountable reimbursements approved by the Unanimous Consent of Members and included within such disbursement) shall be distributed immediately upon receipt thereof, 49% to QMH and 51% to FRH. Any accountable reimbursements to a Member on the Closing Date shall be distributed immediately upon receipt thereof from the Initial Company Disbursement to the Members who incurred the accountable expenses in the amounts that such expenses were borne by such Members.

5.2 **Distributions of Cash Flow.** Subject to any applicable restrictions imposed upon distributions contained in the Financing Documents, or by the Unanimous Consent of Members, the Manager shall make distributions of Cash Flow to the Members no later than forty-five (45) days after the end of each calendar quarter, and otherwise as soon as available for distribution. All such distributions of Cash Flow shall be made to the Members in accordance with their respective Sharing Ratios.

5.3 **Liquidating Distributions.** Distributions to the Members of cash or other Property arising from a liquidation of the Company shall be made in accordance with the Capital Account balances of the Members, as provided in Section 11.5((d))((2)).

5.4 **Distributions in Kind.** Property of the Company may be distributed in kind only with the Unanimous Consent of the Members, and in any event only upon liquidation of the Company. If any Property of the Company is distributed in kind, the Company shall make such distributions in kind pursuant to Section 1.704-(1)(b)(2)(iv)(e)(1) of the Treasury Regulations in the following manner:

(a) An Appraisal of the value of such Property shall be made by an Appraiser, and the Property shall be treated as sold for its fair market value, as determined by the Appraiser. The Capital Accounts of the Members shall be adjusted to reflect any Profits or Losses which would have been realized if the Property had actually been sold for its Appraisal value, and the cash sales proceeds received and distributed; and

(b) The Property shall be distributed to the Members entitled thereto as tenants-in-common in the same proportions in which such Members would have been entitled to under Section 11.5((d))((2)), with respect to liquidating distributions.

5.5 **Withholding.** The Manager is authorized to withhold from distributions to a Member, or with respect to allocations to a Member, and to pay over to a federal, state or local government, any amounts required to be withheld pursuant to the Code or any provisions of any other federal, state or local law. Any amounts so withheld shall be treated as distributed to such Member pursuant to this Article 5 for all purposes of this Agreement, and shall be offset against the net amounts otherwise distributable to such

Member. The Manager may also withhold from distributions that would otherwise be made to a Member, and applied to the obligations of such Member, any amounts that such Member owes to the Company.

5.6 **Limitations: No Priority in Distributions.** No Member shall be entitled to demand and receive property other than cash in return for its Contribution to the Company. In addition, except as otherwise specifically provided in this Agreement, no Member shall have any priority over any other Member as to any Company distributions or as to the return of its Contributions.

6. MANAGEMENT OF COMPANY: AUTHORITY OF MANAGER

6.1 **Authority and Responsibility of Manager.** The Company hereby designates FRH as the Manager. The Company has only one Manager. Except as expressly provided in this Agreement, and subject at all times to the Purposes of the Company, the Manager shall have the authority and responsibility to administer and conduct the business of the Company. Without limiting the generality of the foregoing, the Manager has the authority to do on behalf of the Company all things which are necessary, proper or desirable to carry out its duties and responsibilities with respect to the business of the Company, including, without limitation, the right, power and authority from time to time to do the following:

(a) **Project Management.** Manage and coordinate the development, construction and operation of the Project In accordance with the Company Documents, the Company Budgets, and applicable law, including but not limited to the Company's air permit, and other permits and approvals, rules, and regulations, related to pollution and protection of the environment, and to enforce and perform the obligations and exercise the rights of the Company under the Company Documents.

(b) **Payments and Collections.** Cause to be paid all amounts due and payable by the Company to any Person and to collect all amounts due to the Company.

(c) **Borrowing Funds.** Borrow money from banks and other lending institutions and lenders for any Company Purpose, including borrowing funds from the Senior Lender pursuant to the Financing Documents, and in conjunction therewith, draw, make, execute, and issue promissory notes or other negotiable or non-negotiable instruments, debentures, debt securities, and other evidences of indebtedness, and mortgage, pledge, encumber, assign in trust, and grant security interests in the assets of the Company to secure payment of the borrowed sums, obtain replacements of any mortgage, deed of trust, or other security device, and prepay in whole or in part, refinance, increase, modify, consolidate, or extend any promissory note, debt instrument, or other evidence of indebtedness, mortgage, deed of trust, or other security device, and engage in any other means of financing.

(d) **Accounts.** Open accounts and deposit and maintain funds in the name of the Company.

(e) **Dealing with Properties.** Acquire, hold, develop, construct, own, manage, improve, operate, repair, lease as lessor or lessee, sell, transfer, exchange, dispose or otherwise deal with the Project and real or personal property of any nature whatsoever as may be necessary or advisable for the operation of the Company, including engaging in the activities contemplated in the O&M Agreement, Construction Contract, Power Supply Agreement and the e-prime Power Supply Agreement.

(f) **Independent Contractors, Employees and Agents.** Contract with, delegate duties to, and employ from time to time, any Persons necessary or advisable for the management, operation, and ownership of the Company's business, including operators, managerial and clerical help, agents, Accountants, attorneys, insurance brokers, consultants, engineers, architects, construction contractors, and other Persons necessary, desirable, or appropriate to carry out the business and affairs of the Company, and cause the Company to pay appropriate fees, expenses and other compensation to such Persons.

(g) **Prosecution and Settlement.** Pay, extend, renew, modify, adjust, submit to arbitration, prosecute, sue upon, defend or compromise, upon such terms as the Manager may reasonably determine and upon such evidence as the Manager may reasonably deem sufficient, any obligation, suit, liability, cause of action or claim, either in favor of or against the Company.

(h) **Contracts.** Enter into, execute, acknowledge, deliver, and prepay, modify, or extend any and all contracts, agreements, instruments, conveyances, leases, or other instruments necessary or appropriate to carry out the Purposes of the Company, including the Company Documents.

(i) **Reserves.** Establish and maintain Reserves.

(j) **Non-Recourse Indebtedness.** Require in any obligations of the Company that the Members shall not have any personal liability thereon but that the Person contracting with the Company is to look solely to the Company and its assets for satisfaction.

(k) **Investment of Company Funds.** Invest and reinvest Company Property to accomplish Company Purposes.

(l) **Insurance.** Determine and acquire the types and amounts of insurance coverages required by and for the Company Purposes, Property, and/or business.

(m) **Administration.** Perform all other obligations provided elsewhere in this Agreement to be performed by the Members.

6.2 **Restrictions on Authority of Manager.**

(a) **Actions Requiring the Consent of a Majority in Interest of Members.** The following actions with respect to the Company or the exercise of the Company's rights under the Company Documents shall (subject to the provisions of Sections 6.5 and 6.9(b), and other provisions prohibiting QMH from Voting on matters relating to emission control measures) require the Approval of a Majority in Interest of Members.

(1) **Budget Approval.** Approving or adopting the annual Company Budgets, and any material amendments or modifications thereto.

(2) **Certain Expenditures.** Causing the Company to enter into a Company Document (other than a Material Contract) or making or approving expenditures relating to the Company Documents (including the Material Contracts), if any such expenditure, or series of related expenditures, is not provided for in the applicable Company Budget, or Company Document, and involves making a payment or concerns a monetary value in excess of $50,000.00.

(3) **Supplements and Judgments.** Entering into or consenting to, on behalf of the Company, a settlement, judgment, or consent order with respect to litigation, arbitration, or a proceeding (including governmental investigations, governmental proceedings, or proceedings involving the imposition of a fine or penalty) any of which involves payments or concerns a monetary value in excess of $50,000.00.

(b) **Actions Requiring the Unanimous Consent of the Members.**

(1) **Act in violation of Agreement.** Engaging in any act in violation of this Agreement.

(2) **Company Property.** Possessing Company Property or assigning the rights of the Company or its Members in specific Company Property for other than a Company Purpose.

(3) **Assignments for Benefit of Creditors.** Making, executing, or delivering any assignments for the benefit of creditors or on the assignee's promise to pay the debts of the Company.

(4) **Changing the Purpose of the Company.** Changing the nature of the Company's business from that described in Section 2.5 or engaging in any act that would make it impossible to carry on the ordinary business of the Company.

(5) **Bankruptcy.** Filing any petition for the Company under the federal Bankruptcy Act, or seeking protection under any other federal or state Bankruptcy or insolvency law or debtor relief statute, or consenting to or acquiescing in the filing of any such petition or the seeking of any such protection.

(6) **Disposition of Assets.** Prior to the actual termination of the Company, selling or otherwise disposing of all or substantially all of the assets of the Company.

(7) **Dissolution.** Dissolution and liquidation of the Company in accordance with Article 11.

(8) **Continuation.** Continuation of the business of the Company in accordance with Section 11.4.

(9) **Material Contracts.** Causing the Company to enter into the Material Contracts, or amending, modifying, or terminating a Material Contract.

(10) **Liens.** Pledging, mortgaging, or otherwise creating liens upon or encumbering Company Property, or borrowing money or entering into a loan agreement, deferred purchase agreement, lease, or other financing arrangement, if any such action involves an expenditure of, or concerns a monetary value in excess of $50,000.00, except (A) trade payables incurred in the ordinary course of business and contemplated under the applicable Company Budget, (B) Permitted Loans, and (C) actions taken pursuant to and in compliance with the express provisions of the Financing Documents.

(11) **Tax Elections.** Making any Company election for federal, state or local income tax purposes.

(12) **Change of Accounting Methods.** Changing the accounting method or methods used by the Company.

6.3 **Members' Representatives.** Each Member shall appoint a representative ("**Representative**") to act on its behalf with respect to matters requiring the Vote, Consent or Approval of such Member, in its capacity as a Member (but not in its capacity as Manager) under this Agreement. Each Member shall also appoint one or more alternate Representatives ("**Alternate Representatives**") who shall also be fully authorized to act on its behalf. The initial Representatives and Alternate Representatives are set forth on Exhibit B.

6.4 **Contracts with Interested Parties.** Notwithstanding anything in this Agreement to the contrary, a Member may not vote as a Member, or act as Manager, with respect to any decision, contract or matter in which the Member or any of its Affiliates

(excluding the Company for this purpose) possesses a financial interest. In this respect, if it is proposed that a Member or an Affiliate of a Member provide goods or services to the Company or purchase goods or services from the Company, the Manager, if the Manager is disinterested in the transaction, or if there is no disinterested Manager, the disinterested Member, or if there is no disinterested Member, a disinterested Person, which is not an Affiliate of the Interested Member, appointed by a Majority in Interest of Members, shall represent the Company in the negotiation and administration of such arrangements (including the resolution of disputes).

6.5 **Company Actions Involving the Implementation of Emission Controls.** Notwithstanding anything in this Agreement to the contrary, FRH, or its Transferee, whether in its capacity as Manager or a Member, shall have the sole and irrevocable right to, and is hereby authorized and empowered, during the life of the Project, to Vote upon and make all decisions and take all actions of every nature whatsoever, with respect to the implementation of emission control measures. By way of illustration, and not by way of limitation, FRH, or its permitted Transferee, shall have the sole right to Vote upon and make decisions on behalf of the Company concerning emission controls during the construction phase of the Project (including decisions under the Construction Contract, and specifically including the Approval of change order requests regarding emission controls), and during the operational phase of the Project (including decisions under the O&M Contract, the Power Supply Agreement, and the e-prime Power Supply Agreement relating to the implementation of emission controls), and the sole right to Vote upon and approve items in the Company Budgets relating to emission controls and the implementation thereof. If, for any reason, FRH ceases to be the Manager hereunder, then the rights granted to FRH hereunder shall be granted to the successor Manager, or if there is no successor Manager, to the Members which are not Affiliates of QMH, e-prime, Public Service Company of Colorado, or New Century Energies, Inc. If, in the unlikely event, because of operation of law, or other reason, QMH becomes the only Member of the Company, then QMH shall take such actions as are reasonably required in order to cause the admission of an additional Member, and the designation of such additional Member as Manager of the Company, and until such time as such successor Manager is admitted to the Company, any decisions regarding the implementation of emissions controls shall be made by the Independent Engineer designated pursuant to the Financing Documents. FRH may not delegate its obligations under this Section 6.5 to QMH, or any Person that is an Affiliate of QMH.

6.6 **Officers of Company.** The Manager may, in its discretion, from time to time designate one or more Persons to be officers of the Company. The types and titles of officers shall be determined by the Manager. Officers are not required to be Members of the Company, nor residents of any particular state. Any such officer so elected by the Manager shall, subject to the provisions of Sections 6.5 and 6.9((b)), and other provisions of this Agreement prohibiting QMH from Voting upon matters relating to emission control measures, perform such duties and exercise such authority as may from time to

time be designated by the Manager. In the discretion of the Manager, the same Person may hold one or more offices of the Company. Each officer will hold office until the officer's successor has been duly elected and qualified. Any officer of the Company is subject to removal, with or without cause, by the Manager. Any vacancy in the position of an officer of the Company resulting from a removal, resignation or other event may be filled by the Manager. The removal of an officer is without prejudice to the contract rights, if any, of the person removed. Designation of an officer does not of itself create contract rights. No compensation shall be paid to the officers of the Company.

6.7 **Delegation of Authority.** The Manager may, subject to Section 6.5, from time to time delegate to third persons on terms and conditions deemed necessary and appropriate by the Manager, in its sole discretion, rights and authority with respect to the administration and control of the day-to-day operations of the Company.

6.8 **Dispute Resolution.**

(a) **Resolution by Conciliators.** If any material controversy between the Members arises with respect to the Company's purposes or business, including the terms of this Agreement, and such controversy cannot be settled by mutual accord, any Member may seek to have the dispute resolved in accordance with the following procedures:

(1) Any Member may refer the disagreement to the Chief Executive Officer or equivalent of both of the Members (the "**Conciliators**"). The Member submitting the dispute shall simultaneously give notice to the other Member(s) of such submission. The Conciliators shall negotiate in good faith regarding the subject of disagreement.

(2) The procedure for resolving such dispute shall in each instance be determined by the Conciliators, and the same procedure need not be followed for different disputes. The Members hereby confirm their understanding that the type of dispute involved and the extent of the need for urgency will determine the procedure to be followed in each instance. The Conciliators shall afford each Member, and any representative designated by such Member, an opportunity to present such Member's views, although the Conciliators need not hold formal hearings. If the Conciliators determine, after good faith negotiations, that they are unable to resolve the dispute, or if the dispute is not resolved within thirty (30) days after it is referred to the Conciliators, then they shall immediately give written notice of the failure to resolve the dispute to each Member.

(b) **Resolution by Independent Engineer.** If a material controversy or claim is not settled in accordance with the procedures set forth in Section 6.8((a)), and the matter in dispute involves any matter(s) primarily requiring the exercise of engineering judgment, then at the request of a Member made within twenty (20) days following the

notice provided for in Section 6.8((a))((2)) stating that the Conciliators are unable to resolve the dispute, the dispute shall immediately be brought to the Independent Engineer, in accordance with the following procedures:

(1) The Independent Engineer shall be required to make a final determination, not subject to appeal, as soon as possible and in any event within thirty (30) days from the receipt of such dispute by the Independent Engineer. The parties agree to be bound by the terms of the Independent Engineer's final determination. The determination by the Independent Engineer shall be made in writing and shall contain written findings of fact on which its decision is based, and shall be specifically enforceable by a court of competent jurisdiction. The costs associated with the resolution of any matter by the Independent Engineer shall be borne by the Company.

(2) The Independent Engineer, and any successor Independent Engineer, shall be mutually selected by the Unanimous Consent of the Members to serve in such capacity pursuant to this Agreement. The Independent Engineer shall have knowledge with respect to facilities substantially similar to the Project. The fees of the Independent Engineer shall be paid by the Company. If the parties have not agreed upon the selection of an Independent Engineer within fifteen (15) calendar days following a request by a Member to select the Independent Engineer, then the Independent Engineer shall be selected by the American Arbitration Association as expeditiously as possible. The Members shall mutually cooperate to retain the Independent Engineer upon terms and conditions mutually satisfactory to the Members as soon as practicable after selection of the Independent Engineer by the American Arbitration Association.

(3) If the Independent Engineer resigns, or the Members agree to terminate the services of the selected Independent Engineer, or if a Member demonstrates that the Independent Engineer is subject to a conflict of interest or malfeasance, then the Members by Unanimous Consent, shall agree upon a replacement. The successor Independent Engineer shall not otherwise be associated with the transactions contemplated by this Agreement. The successor Independent Engineer shall have knowledge with respect to facilities substantially similar to the Project. If the Members have not agreed upon the selection of a successor Independent Engineer within fifteen (15) days following the resignation or termination of the Independent Engineer, a new Independent Engineer shall be selected by the American Arbitration Association as expeditiously as possible.

(c) **Resolution by Arbitration.** Controversies which are to be resolved by the Independent Engineer as provided in Section 6.8((b)) shall be resolved solely by the Independent Engineer and shall not be resolved by arbitration. If any material controversy between the Members involving the interpretation of or application of or compliance with this Agreement is not settled in accordance with the procedure set forth in Section 6.8((a)), then any Member shall thereafter have the right, exercisable within

thirty (30) days following the notice provided for in Section 6.8((b))((3)) stating that the Conciliators are unable to resolve the dispute, to submit such controversy or claim to arbitration in accordance with the then-existing commercial arbitration rules of the American Arbitration Association.

(d) **Voting Rights Not Supplanted.** Notwithstanding any provision of this Agreement which could be construed to the contrary, the dispute resolution procedures set forth in this Section 6.8 are not available to, and may not be invoked, for the purpose of overriding, superseding or supplanting the Vote of any Members on any matter properly to be determined by a Vote of the Members.

6.9 **Company Budgets, and Expenses, and Bank Accounts.**

(a) **Company Budgets.**

(1) Establishment of Company Budgets.

(A) Development Period Budget. The Manager shall cause to be prepared, for the approval of a Majority in Interest of the Members, a Development Period budget (the "**Development Period Budget**"), which shall remain in effect, subject, however, to modifications from time to time as appropriate, from the date of execution of this Agreement up to the Closing Date. The Development Period Budget shall be reviewed periodically by the Manager, and the Manager shall periodically cause revisions to be prepared, for the Approval of a Majority in Interest of the Members, as necessary in order to provide for the activities of the Company during the Development Period.

(B) Construction Period Budget. The Manager shall cause to be prepared, for the Approval of a Majority in Interest of the Members, a construction period budget (the "**Construction Period Budget**"), which shall remain in effect throughout the construction period of the Project up to and including the Commercial Operation Date. The Manager shall deliver or cause to be delivered to each Member, within twenty (20) days after the end of each month, a comparison to the Construction Period Budget of actual draws of funds made pursuant to the Financing Documents. The Construction Period Budget shall be prepared in accordance with the applicable requirements of the Financing Documents.

(C) Operating Period Budget. The Manager shall cause to be prepared, for the Approval of a Majority in Interest of the Members, a proposed annual Operating Period Budget ("**Operating Period Budget**"), which shall consist of a separate operating budget and a separate capital budget, together with an annual operating plan setting forth the underlying assumptions and implementation plans. Unless otherwise required by the Financing Documents, the initial Operating Period Budget for the Company shall be for the period beginning on the Commercial Operation Date and ending on the next December 31. Subsequent Operating Period Budgets shall be for

calendar years ending on December 31. The Operating Period Budget shall be presented to the Members for Approval by a Majority in Interest of Members no later than ninety (90) days before the Commercial Operation Date in the case of the initial Operating Period Budget, and no later than ninety (90) days before January 1 in the case of each subsequent calendar year's Operating Period Budget. These dates may be adjusted by the Manager, as appropriate, if necessary, in order to comply with the requirements of the Financing Documents. Each proposed Operating Period Budget shall represent the best estimate of all revenues, loan proceeds, costs and expenses with respect to the Company for the period to which such Operating Period Budget relates, and its estimate of any capital expenditures required during such period. Each Operating Period Budget shall be prepared in accordance with the applicable requirements of the Financing Documents. Each proposed Operating Period Budget shall become effective upon Approval by a Majority in Interest of the Members.

(b) **Approval of Budget Items Relating to Emission Control Measures.** Notwithstanding the foregoing, QMH shall not be entitled to Vote upon, and sole Company Budget Approval rights shall be vested in FRH, or its permitted Transferee, with respect to budget items relating to emission control measures and the implementation thereof, whether such budget items are included within a Development Period Budget, Construction Period Budget, or Operating Period Budget. Notwithstanding the Budget Approval process, or any provision of this Agreement, FRH, or its permitted Transferee, is hereby empowered to incur any expenditures on behalf of the Company that it deems necessary or appropriate, and take any actions on behalf of the Company, with respect to the implementation of emission control matters.

(c) **Expenses of the Company.** All expenses incurred by the Company shall, to the extent practicable, be billed directly to and paid by the Company.

(d) **Bank and Money Market Accounts.** The Company shall maintain its cash funds in bank or money market accounts in its name at one or more banks or other financial institutions that a Majority in Interest of Members may select; provided, however, that such institution (a) shall be organized under the laws of the United States or any state thereof; and (b) unless a Majority in Interest of Members otherwise Consent, shall have a combined capital, surplus, and undivided profits of at least $100,000,000 and (c) shall be selected in accordance with the requisites of the Financing Documents. Company funds shall not be commingled with the funds of any other Person and shall be used only for Company Purposes.

6.10 **Liability and Indemnification of the Members and Manager.**

(a) **Exculpation of the Members and Manager.** The Members, the Manager and the trustees, beneficiaries, shareholders, constituent partners, officers, directors, members, employees, representatives, and agents of the Members (individually, a "**Member Indemnitee**") shall not be liable, responsible or accountable in damages or

otherwise to the Company or to any of the Members for any act or omission performed or omitted (1) in good faith on behalf of the Company, and (2) in a manner not constituting willful misconduct, actual fraud, or gross negligence.

(b) **Indemnification of Members and Manager by the Company.** To the fullest extent permitted by the Act and applicable law, the Company, its receiver, or its trustee shall indemnify, defend and hold harmless each Member Indemnitee from and against any and all claims or threats thereof, expenses, judgments, losses, costs, damages, or liabilities or threats thereof, (including, without limitation, attorneys' fees and costs of investigation, testifying and defense relating to the Company) which such Person may incur by reason of being a Member, the Manager, or a trustee, beneficiary, shareholder, member, constituent partner, officer, director or employee of a Member or the Manager (regardless of the disclosure or lack of disclosure of such status) or by virtue of taking any action pursuant to this Agreement in such capacity unless (1) such claim, expense or liability is caused by an act or omission performed or omitted by the Member Indemnitee in a manner constituting willful misconduct, actual fraud, or gross negligence; or (2) such Member Indemnitee did not conduct itself in good faith; or (3) such Member Indemnitee did not reasonably believe that its conduct was in the Company's best interest; or (4) in the case of any criminal proceedings, that it did not reasonably believe that its conduct was lawful. **It is understood and agreed by all Members that the Member Indemnitees shall be indemnified and held harmless for their own negligence.** Expenses incurred by a Member Indemnitee in defense or settlement of any claim that may be subject to indemnification may be advanced by the Company prior to the final disposition thereof (1) upon receipt of an undertaking by or on behalf of such Member Indemnitee to repay such amount if it is ultimately determined that such Member Indemnitee is not entitled to indemnification, and (2) a reasonable determination that such Member Indemnitee is able to repay such amounts. A Member Indemnitee may not be indemnified under this Section 6.10((b)) with respect to a proceeding in which: (i) the Member Indemnitee is found liable on the basis that the Member Indemnitee improperly received personal benefit, whether or not the benefit resulted from an action taken in the Member Indemnitee's official capacity; or (ii) the Member Indemnitee is found liable to the Company or to the Members.

(c) **Mandatory Indemnification of Successful Defense.** The Company shall indemnify a Member Indemnitee for the claims, expenses, and liabilities described in Section 6.10((b)), incurred by such Member Indemnitee in connection with a proceeding in which the Member Indemnitee has been wholly successful on the merits or otherwise, in the defense of the proceeding.

(d) **Insurance: Satisfaction From Company Assets.** The Company may purchase and maintain insurance on behalf of Member Indemnitees against any liability that may be asserted against or expense that may be incurred by such Person in connection with the Company's activities. Any indemnification from the Company

provided for hereunder shall be satisfied out of Company assets (including insurance proceeds) only.

(e) **Determination that Standard has Been Met.** A determination that indemnification is permissible under this Section 6.10 may be made:

(1) By special legal counsel selected by a Majority in Interest of Members who at the time of the determination are not, and whose Affiliates are not, named defendants or respondents in the proceeding; or

(2) By any other method allowable under the Act.

6.11 **Other Matters Concerning Members and Manager.**

(a) **Reliance Upon Documents.** The Members and the Manager may rely upon and shall be protected in acting or refraining from acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, bond, debenture or other paper or document believed by them to be genuine and to have been signed or presented by the proper party or parties.

(b) **Reliance Upon Consultants and Advisors.** The Members and the Manager may consult with legal counsel, Accountants, Appraisers, management consultants, investment bankers, and other consultants and advisers selected by them, and any opinion of any one of those Persons as to matters that a Member or the Manager reasonably believes to be within that Person's professional or expert competence constitutes full and complete authorization and protection for any action taken or suffered or omitted by the Member or the Manager in good faith and in accordance with that opinion.

6.12 **Management Fee.** The Manager, or its designee, shall receive a management fee of $65,000 per year for managing the affairs of the Company, and for performing accounting and administrative services for the Company. The management fee shall be an expense of the Company and shall not be considered to be a distribution to the recipient of such fee pursuant to Section 5.2. The management fee may be changed (increased or decreased) by the Unanimous Consent of the Members.

7. ACCOUNTING AND RECORDS

7.1 **Fiscal Year.** The fiscal year of the Company shall be the year ended December 31, unless another period is designated by the Manager (a) if existing law, or a change in law require the selection of a different fiscal year or (b) with the consent of all Members, which Consent may be withheld in their sole and absolute discretion.

7.2 **Method of Accounting.** Unless otherwise provided herein, the Company's books of account shall be maintained in accordance with GAAP; provided, however, that

for purposes of making allocations and distributions hereunder (including, without limitation, distributions in liquidation of the Company in accordance with Section 11.5((d))((2)), Capital Accounts and Profits, Losses and other items described in Articles 3 and 4 shall be determined in accordance with federal income tax accounting principles utilizing the accrual method of accounting, with the adjustments required by Treasury Regulation Section 1.704-1(b) to properly maintain Capital Accounts. Each Member acknowledges that the Capital Account balances of the Members for the purposes described in the preceding sentence are not computed in accordance with GAAP, and accordingly that any GAAP financial statements for the Company do not reflect their true Capital Account balances.

7.3 **Books and Records and Inspection.**

(a) **Maintenance of Books.** Proper and complete records and books of account of the Company's business, including all such transactions and other matters as are usually entered into records and books of account maintained by Persons engaged in businesses of like character or as are required by the Act, shall be kept at the Company's principal office and place of business or at such other office as shall be approved by a Majority in Interest of Members.

(b) **Provision of Books and Records.** The Manager shall cause to be promptly provided to each Member, upon written request, for any purpose reasonably related to the Member's Interest, and subject to Section 15.5 regarding confidentiality, access to the following:

(1) A current list of the full name and last known business or residence address of each Member, together with the Contributions and Sharing Ratio of each Member.

(2) A filed copy of the Company's certificate of formation and all certificates of amendment thereto, together with executed copies of any powers of attorney pursuant to which any certificate has been executed.

(3) Copies of the Company's federal, state and local income tax or information returns and reports.

(4) An original copy of this Agreement and all amendments thereto.

(5) Financial statements of the Company.

(6) The Company's books and records as they relate to the internal affairs of the Company.

7.4 **Reports.** The Manager shall cause the following to be sent to each Member:

(a) **Monthly Reports.** Within twenty (20) days after the end of each fiscal month of the Company, (1) a statement of income and expense for such month and for the Year to date compared to the applicable Company Budgets, and a balance sheet, (2) the Construction Period Budget reports described in Section 6.9((a))((1))((B)), and (3) any monthly reports provided to the Company by any operator of the Project.

(b) **Quarterly Reports.** Within forty-five (45) days after the end of each of the first three quarterly fiscal periods in each Year of the Company, a copy of: (1) a management prepared balance sheet, income statement, and statement of Members' capital with respect to the Company as of the end of such quarter, and the Year to date; (2) a management prepared statement of income for the Company comparing the actual results for the quarter and the Year to date with budgeted amounts as set forth in the most recently approved and applicable Company Budgets, together with a narrative explanation of material variances between actual results and budgeted amounts; and (3) a summary of significant performance statistics with respect to the Project including information concerning construction activities, compliance with construction completion milestones and deadlines, and the operational performance of the Project.

(c) **Annual Report.** Within ninety (90) days after the end of each Year of the Company, a copy of: (1) a balance sheet of the Company, as at the end of that year, (2) a statement of income, Members Capital and changes in financial position of the Company for that Year, setting forth in comparative form the figures for the previous Year (if any), (3) a general description of the activities of the Company during the period covered by the report, and (4) a general description of material transactions between the Company and any Member or any Affiliates of any Member, including a description of the fees or compensation paid by the Company to a Member or its Affiliates, and the services performed by the Member or its Affiliate.

(d) **Alternative Reports.** In lieu of providing reports separately prepared at the direction of the Manager, the Manager may, if the information required to be given in any monthly, quarterly, or annual report, is contained in other documentation (such as, for example, reports provided pursuant to the Power Supply Agreement, or the Financing Documents), cause such other information to be provided to the Members in lieu of a separately prepared report.

7.5 **Audited Financial Statements.** The annual financial statements of the Company shall be audited (which audit shall be conducted in accordance with GAAP) and certified by the Company's Accountants.

7.6 **Tax Matters.**

(a) **Status of the Company.** The Members acknowledge that this Agreement creates a partnership for federal and state income tax purposes, and hereby agree not to elect to be excluded from the application of Subchapter K of Chapter 1 of Subtitle A of the Code or any similar state statute.

(b) **Tax Elections and Reporting.**

(1) *Fiscal Year.* The Company shall adopt the Fiscal Year described in Section 7.1 as the annual accounting period, for federal and state income tax purposes.

(2) *Code Section 754 Election.* The Manager shall, upon the written request of any Member benefited thereby, cause the Company to file an election under Code Section 754 and the Treasury Regulations thereunder to adjust the basis of the Company assets under Code Section 734(b) or 743(b), and a corresponding election under the applicable sections of state and local law.

(c) **Company Tax Returns.** The Accountants shall prepare or review the necessary federal income tax returns and information returns for the Company. Other tax returns shall be prepared in a manner directed by the Manager. Each Member shall provide such information, if any, as may be needed by the Company for purposes of preparing such tax and information returns. The Manager shall cause to be delivered to each Member within ninety (90) days after the end of each year a copy of the federal income tax returns for the Company as filed with the appropriate taxing authorities, and upon the written request of any Member, a copy of any state and local income tax return as filed. No Member shall report on its Federal Income Tax Return its distributive share of Company Profits or Losses or any Company item of income, gain, losses, deductions or credits in an amount or manner that is inconsistent with the Company's Federal Income Tax Return unless otherwise required by the Code or the Treasury Regulations.

(d) **Tax Audits.**

(1) *Federal Tax Matters.* FRH shall be the tax matters representative of the Company (the "**Tax Matters Member**") with respect to federal income tax audits. If FRH cannot or does not desire to serve as Tax Matters Member, then the Tax Matters Member shall be a Member appointed by a Majority in Interest of Members. The Tax Matters Member, as an authorized representative of the Company, shall direct the defense of any claims made by the IRS to the extent that such claims relate to the adjustment of Company items at the Company level. The Tax Matters Member shall promptly deliver to each Member a copy of any notice of beginning of administrative proceedings or any report explaining the reasons for a proposed adjustment received from the IRS relating to or potentially resulting in an adjustment of Company

items. The Tax Matters Member shall keep each Member advised of all material developments with respect to any proposed adjustment which come to its attention, including, without limitation, the scheduling of all conferences and substantive telephone calls with the IRS. Each Member shall be entitled, at its own expense, to attend all meetings with the IRS and to review in advance any material written information (including, without limitation, any pleadings, memoranda or similar items) to be submitted to the IRS. Without first obtaining the Consent of a Member, the Tax Matters Member shall not, with respect to any proposed adjustment of a Company item which materially and adversely affects such Member, (A) enter into a settlement agreement which purports to bind Members other than the Tax Matters Member (including, without limitation, any stipulation consenting to an entry of decision by the Tax Court), or (B) enter into an agreement or stipulation extending the statute of limitations.

(2) *State and Local Tax Matters.* The Tax Matters Member shall promptly deliver to each Member a copy of all notices, communications, reports or writings of any kind with respect to income or similar taxes received from any state or local taxing authority relating to the Company which might materially and adversely affect each Member, and shall keep such Members advised of all material developments with respect to any proposed adjustment of Company items which come to its attention.

(3) *Continuation of Rights.* Each Member shall continue to have the rights described in this Section 7.6((d)) with respect to tax matters relating to any period during which it was a Member, whether or not it is a Member at the time of the tax audit or contest.

(4) *Reimbursement of Expenses of Tax Matters Member.* The Tax Matters Member shall be reimbursed for all expenses, disbursements, and advances incurred or made by it in connection with its obligations as Tax Matters Member of the Company, including its activities as Tax Matters Member associated with administrative or judicial proceedings concerning the tax liabilities of the Members which relate to their ownership of Interests in the Company.

8. COMPANY MEETINGS

8.1 **Meetings for Transaction of Company Business.** At any time the Manager, or any Member, may call a meeting of the Members to transact business that the Members or any group of Members may conduct as provided in this Agreement. The call must be made by notice to all other Members on or before the tenth (10th) day prior to the date of the meeting specifying the location and the time and stating the business to be transacted at the meeting, which must include any appropriate items the Members requesting the meeting have specified in their request. The chairperson of the meeting shall be an individual the Manager specifies. At the meeting, the Members may take any action included in the notice of the meeting by Vote of Members present, in person, by proxy, or, in the event of incapacity of a Member, by an attorney-in-fact, constituting

Members whose approval is required for that action pursuant to the other provisions of this Agreement. With respect to other matters, the meeting must be conducted in accordance with rules reasonably established by the Manager and Approved by a Majority in Interest of Members represented at such meeting. A quorum shall consist of all Members, if the matter under consideration requires the Unanimous Consent of the Members, and in all other instances a quorum consists of at least the minimum number of Members, or Members possessing the required Company Sharing Ratios, as appropriate, required to Consent to the matter to be acted upon. The Manager shall be under no obligation to call meetings of the Members, and meetings of the Members are not required in order to obtain the Consent of the Members to any action of the Members or the Company. This Section 8.1 shall not be construed to grant to Members any Consent rights not specifically provided for in this Agreement.

9. TRANSFERS AND DISPOSITIONS OF INTERESTS

9.1 **No Change Except Pursuant to This Article.** No Member shall withdraw from or Transfer any interest in the Company, and no Person shall become an Assignee or be admitted to the Company as a substituted or additional Member, except as provided in this Article 9. Any transfer made in violation of this Article 9 shall be void. This Article 9, however, shall not be construed to prevent the assignment or pledge by any Member of all or any part of its interest in the Company as collateral security for the Company's obligations pursuant to the Financing Documents.

9.2 **Members.**

(a) **Permitted Assignments by Members.** At any time, a Member may Transfer all or part of its Membership Interest (but only if the transferor is not then in material default under this Agreement), provided that the following conditions are fully satisfied:

(1) any transferee agrees in writing, in form and substance acceptable to a Majority in Interest of Members to take such Membership Interest subject to and to be bound by the applicable terms, provisions and conditions of this Agreement, and has executed such other documents or instruments as may be required by a Majority in Interest of Members to effect such Transfer;

(2) all costs to the Company or to any other Member of such Transfer shall be paid by the transferee or transferor, including costs associated with the amendment of this Agreement;

(3) the Transfer shall not cause, directly or indirectly, a termination of the Company pursuant to Section 708 of the Code or a dissolution of the Company under the Act;

(4) the Transfer shall not cause, directly or indirectly, the Company to be classified as an entity other than a partnership for purposes of the Code;

(5) the transferee is a sophisticated investor and not an individual;

(6) the Transfer is accomplished in a non-public offering in compliance with and exempt from any registration or qualification requirements under the Securities Act of 1933, as amended, or any other applicable Federal or state securities laws and regulations;

(7) the Transfer shall not result in a breach or violation of, or an event of default or right of termination under, any material obligation or material agreement to which the Company is a party (including the Material Contracts and the Financing Documents) or give rise to a right to accelerate any indebtedness of the Company;

(8) the Transfer shall not result in a breach or violation of any permit, order, rule, regulation, or other applicable law or require any governmental approval;

(9) the Transfer shall not cause the status of the Project as an Exempt Wholesale Generator, within the meaning of PUHCA, or any successor law, to be lost;

(10) each other Member has received an opinion of counsel to the transferor or transferee, from a law firm, and in form and substance reasonably acceptable to a Majority in Interest of Members, addressing the matters specified in clauses (3) through (8) above;

(11) the transferee has been Consented to by all Members which Consent shall not, except as otherwise expressly provided for herein, be unreasonably withheld.

9.3 **Substitution of Members.** Any permitted transferee under Section 9.2 who is not already a Member shall become a substituted Member only if (a) the assignor or transferor has so provided in the conveyance, (b) such transferee has agreed in writing to become a Member herein and to be bound by all the terms and conditions of this Agreement, and (c) each Member has Consented to such permitted transferee becoming a substitute Member, which Consent may be withheld in their sole discretion, unless the transferee is acquiring 100% of the Membership Interest of QMH or FRH, in which event such Consent may not be unreasonably withheld. Until admitted to the Company as a substituted Member, any permitted transferee shall not be entitled to Vote on Company

matters, and shall not have any other rights of a Member other than the right to Profits, Losses, and distributions.

9.4 **Right of First Offer.** Before any Member may Transfer all or part of its Membership Interest pursuant to Section 9.2, with the exception of Transfers to an Affiliate, that Member (the "**Selling Member**") shall notify the Manager in writing that the Selling Member intends to Transfer its Membership Interest. The notice shall contain a full and complete designation of the price at and terms upon which the Selling Member is proposing to Transfer its Company Interest. The Members, other than the Member whose interest is the subject of such Transfer, will have the unilateral option to acquire the interest of the Selling Member, upon the following terms and conditions:

(a) **Members' Option.** The Manager shall immediately notify each Member, and each Member (other than the Member whose Interest is the subject of the proposed Transfer), shall have the right to purchase that portion of the Interest that its Sharing Ratio bears to the Sharing Ratios of the other Members entitled to participate in such purchase. Each such Member shall have twenty (20) days from the date it actually receives notice from the Manager within which to accept the offer and agree to purchase such Interest, or any portion thereof. If any Member declines to purchase its proportionate part of the Interest, the Manager shall promptly notify the Members electing to participate in such purchase, and each such participating Member may agree to purchase, within twenty (20) days from the date of receipt of such notice, that portion of the rejected Interest that its Sharing Ratio bears to the Sharing Ratios of all such participating Members. If any Interest remains unpurchased subsequent to the procedure established in the immediately preceding sentence, such procedure shall be repeated by the Members who elected to purchase until no Interest remains unpurchased, or until no Member has agreed to purchase an additional portion of the transferred Interest. The election to purchase a portion of the Interest by a Member must be made in writing and delivered to the Manager within the specified option period, and failure to accept in that manner and within the specified time shall constitute a rejection. If the other Members elect not to exercise their right to purchase the entire Interest proposed to be transferred, the Selling Member may Transfer the entire Membership Interest proposed to be transferred, but not less than such entire Interest, for a price and on terms no less favorable to the Selling Member than those described in the notice, for a period of one hundred eighty (180) days following the date of the notice provided by the Manager to the Members pursuant to the first sentence of this Section 9.4((a)). If the Selling Member does not complete the Transfer of the entire Membership Interest proposed to be transferred during this period, the provisions of this Section 9.4 shall again apply to any later Transfer.

(b) **Rights of Purchaser.** A purchaser of all or any portion of the Selling Member's Membership Interest, other than an existing Member, shall have the

status of an Assignee and shall become a Substitute Member only upon satisfaction of all of the requirements of Section 9.3.

(c) **Prohibited Utility Status.** No purchase of all or any portion of the Selling Member's Membership Interest shall be made by a Member, if such purchase would cause the Project or the Company to have Prohibited Utility Status, or result in a breach or violation of any permit, order, rule, regulation, or other applicable law.

9.5 **Withdrawal of Members from Company: Void Transfers.** Unless otherwise expressly stated in this Agreement, no Member has the right to withdraw from the Company before the Company dissolves, and is wound up, liquidated and terminated pursuant to Article 11. Any attempted Transfer in violation of this Article 9 by any Member shall be void and of no force or effect.

9.6 **Acquisition of Membership Interest Upon an Unauthorized Transfer or the Occurrence of a Purchase Event.** Upon the occurrence of a Purchase Event with respect to a Member, or if a Member's Interest in the Company is subjected to a lawful "charging order," or if a Member makes an unauthorized Transfer or assignment of a Membership Interest, which the Company is required by law (and by order of a court) to recognize, the Members, other than the Member whose Interest is the subject of such Transfer or Purchase Event, will have the unilateral option to acquire the Interest of the transferee, Assignee, or Member with respect to which the Purchase Event has occurred (a "**Purchase Option Member**"), or any fraction or part thereof, upon the following terms and conditions.

(a) **Members' Option.** The Manager shall immediately notify each Member, and each Member (other than the Member whose Interest is the subject of the Transfer or Purchase Event at issue), shall have the right to purchase that portion of the Interest that its Sharing Ratio bears to the Sharing Ratios of the other Members entitled to participate in such purchase. Each such Member shall have twenty (20) days from the date it actually receives notice from the Manager within which to accept the offer and agree to purchase such Interest, or any portion thereof. If any Member declines to purchase its proportionate part of the Interest, the Manager shall promptly notify the Members electing to participate in such purchase, and each such participating Member may agree to purchase, within twenty (20) days from the date of receipt of such notice, that portion of the rejected Interest that its Sharing Ratio bears to the Sharing Ratios of all such participating Members. If any Interest remains unpurchased subsequent to the procedure established in the immediately preceding sentence, such procedure shall be repeated by the Members who elected to purchase until no Interest remains unpurchased, or until no Member has agreed to purchase an additional portion of the transferred Interest. The election to purchase a portion of the Interest by a Member must be made in writing and delivered to the Manager within the specified option period, and failure to accept in that manner and within the specified time shall constitute a rejection.

(b) **Determination of Purchase Price.** Unless the Company or the purchasing Members, as the case may be, and the transferee, Assignee, or Purchase Option Member agree otherwise, the purchase price for the Interest, or any fraction thereof, shall be determined by an Appraisal. The Appraiser shall be selected by the Members (excluding any Member whose Interest or whose Affiliate's Interest is the subject of such Transfer or Purchase Event).

9.7 **Effect of Transfer.**

(a) **Responsibility for Obligations.** No Transfer of an Interest by a Member, including a Transfer of less than all of its rights under this Agreement or the Transfer of all of its rights under this Agreement to more than one Person, relieves that Member of its obligations under this Agreement arising before that Transfer or, unless the Assignee becomes a substituted Member, arising after that Transfer.

(b) **Assignee as Member for Tax Purposes.** The Company may treat an Assignee as a Member solely for tax purposes. Accordingly, the Company may deliver to any Assignee the income tax reports distributable to the Member through whom the Assignee claims an Interest (such as K-1's and any state equivalents); and the Assignee must report all the income and loss so reported on its individual tax return as required by the Code.

10. WITHDRAWAL AND REMOVAL OF MANAGER

10.1 **Right to Remove.**

(a) The Manager shall serve in such capacity until its appointment is revoked in writing (with cause only) by the Unanimous Consent of Members (excluding the Member that is the Manager), until it ceases to be a Member, or until it ceases to serve for any other reason. FRH, or its successors, shall not be removed as Manager, if such removal would (i) in the written opinion of independent counsel selected by FRH, or its successors, and Approved by QMH, cause the Company to be considered to be under common control with Public Service Company of Colorado, e-prime, Inc., or any Affiliate of New Century Energies, Inc., with the result that the Project would be considered, together with any generating facilities operated by Public Service Company of Colorado, e-prime, Inc., or any other Affiliate of New Centuries, Inc., to constitute a single source, or (ii) result in a violation of the Project's air permit or federal or state law relating to air pollution, or result in a material violation of any other applicable law, rule or regulation. A Manager that is removed from such position shall continue to remain as a Member, if otherwise qualified. For the purposes of this Section 10.1(a), "cause," for removal of the Manager, shall mean (i) such Manager's failure to timely make a required Contribution; (ii) the commencement of bankruptcy proceedings by or against such Manager, (iii) such Manager's breach of any material provision of this Agreement, (iv) such Manager's breach of its fiduciary duties; (v) if the Manager and its Affiliates

cease to hold, in the aggregate, Company Interests representing 10% of the Sharing Ratios of all Members, and (vi) the cessation of such Manager's existence as a legal entity.

Notwithstanding the foregoing, however, with respect to any of the events constituting cause for removal, as described above, other than the events described in Sections 10.1((a))(v) and (vi), the Manager shall not be removed if the Manager has, within thirty days following receipt by the Manager of a notice delivered by the removing Members, delivered a notice to each such removing Member describing in writing, and in reasonable detail, the nature of the actions it intends to take to resolve the issue and rectify the consequences thereof, and has within such time period diligently undertaken to commence such actions, and within sixty days after delivery of such notice, has resolved the issues and rectified the consequences thereof in a manner reasonably acceptable to the removing Members.

(b) **Replacement of Manager.** If a Manager ceases to serve in such capacity for any reason, a new Manager shall be promptly appointed by the Unanimous Consent of the Members. Such Manager shall not be affiliated with QMH, Public Service Company of Colorado, e-prime, Inc., or New Century Energies, Inc. It is the express intention and agreement of the parties hereunder, that at no time during the life of the Project shall the Manager be affiliated with QMH, Public Service Company of Colorado, e-prime, Inc., or New Century Energies, Inc. The provisions of Section 6.5, 6.9((b)), and other provisions related to the designation of a Manager if QMH were to become the only Member, and the prohibitions placed upon QMH from Voting on emission control measures, shall apply with full force and effect with respect to the selection, rights and obligations of a substitute Manager.

11. DISSOLUTION, TERMINATION AND LIQUIDATION

11.1 **No Termination.** Except as expressly provided in this Agreement, no Member shall have the right, and each Member hereby agrees not to, dissolve, terminate or liquidate the Company. No Member shall have the right, and each Member hereby agrees not to, petition a court for the dissolution, termination or liquidation of the Company except as such rights are provided in this Agreement or are available under applicable law notwithstanding any agreement herein to the contrary.

11.2 **Events of Dissolution and Termination.** The Company shall be dissolved and terminated upon the occurrence of any of the following:

(a) **Expiration of Term.** Expiration of the term of the Company set forth in Section 2.3.

(b) **Consent of Members.** The Unanimous Consent of the Members to dissolve the Company, but only on the effective date of dissolution specified by such Members.

(c) **Illegality.** Any event which makes it unlawful for the Company business to be continued.

(d) **Judicial Decree.** The entry of a decree of judicial dissolution under Section 18-802 of the Act.

(e) **Other Events.** Any other event which, notwithstanding an agreement to the contrary, causes a dissolution and termination of the Company under the Act.

11.3 **Insolvency of Member.** A dissolution of the Company shall not be caused by the Bankruptcy, removal, withdrawal, dissolution or liquidation of a Member or the substitution of a Member.

11.4 **Continuation of Business of Company.** If there are multiple Members and one or more Members are removed, dissolve, liquidate, withdraw or cease to serve for any other reason, and there is at least one remaining Member, the business of the Company shall continue by the remaining Member(s) without amendment to this Agreement.

11.5 **Procedures Upon Dissolution.**

(a) **General.** If the Company dissolves, and if the Company is not to be continued, it shall commence winding up pursuant to the appropriate provisions of the Act and the procedures set forth in this Section 11.5. Notwithstanding the dissolution of the Company, prior to the termination of the Company, the business of the Company and the affairs of the Members, as such, shall continue to be governed by this Agreement.

(b) **Control of Winding Up.** The winding up of the Company shall be conducted under the direction of the Manager; provided, however, that if the Manager is a Member that caused the dissolution of the Company in contravention of this Agreement, such Manager shall not participate in the control of the winding up of the Company and if, in such event there is no other Manager, a Liquidator shall be appointed by a Majority in Interest of Members, and provided further, that if the dissolution is caused by entry of a decree of judicial dissolution pursuant to Section 11.2((d)), the winding up shall be carried out in accordance with such decree. The Manager, or if liquidation is conducted by a Liquidator appointed by a Majority in Interest of Members, such Person, is referred to herein as the "Liquidator."

(c) **Manner of Winding Up.** The Company shall engage in no further business following dissolution, if the Company is to be liquidated and terminated, other than that necessary for the orderly winding up of the Company business and distribution of assets. The maintenance of offices shall not be deemed a continuation of the business for purposes of this Section 11.5((c)). Upon dissolution of the Company, the Liquidator shall (i) cause to be filed with the Delaware Secretary of State a certificate of dissolution in accordance with the Act, and (ii) determine the time, manner and terms of any sale or sales of Company Property pursuant to such winding up, consistent with its fiduciary responsibility and having due regard to the activity and condition of the relevant market and general financial and economic conditions. Distributions may be made in kind to the Members only with the Unanimous Consent of the Members. If assets are distributed in kind then such assets shall be distributed in the manner described in Section 5.4. It is intended by the Members that no different treatment of a Member shall result from a decision to distribute assets in kind as opposed to selling them prior to liquidation.

(d) **Application of Assets.** In the case of a dissolution and liquidation of the Company, the Company's assets shall be applied as follows:

(1) *Creditors.* First, to payment of the liabilities of the Company owing to third parties (including Affiliates of the Members) and to Members. After payment of any such known liabilities, the Liquidator shall set up such Reserves as are reasonably necessary for any contingent or unforeseen liabilities or obligations of the Company. Such Reserves may be paid over by the Liquidator to an escrow holder or trustee, to be held in escrow or trust for the purpose of paying any such contingent or unforeseen liabilities or obligations, and, at the expiration of such period as the Liquidator may deem advisable, such reserves shall be distributed to the Members or their assigns in the manner set forth in Section 11.5((d))((2)) below.

(2) *Members.* Second, to the Members in accordance with the credit balances in their Capital Accounts, after, as applicable, (i) all allocations of Profits or Losses and other items pursuant to Article 4 and (ii) adjustment of the Members' Capital Account balances pursuant to Section 3.1((c))((1)), provided that if there are insufficient assets available to pay to each Member the positive balance in such Member's Capital Account, the available assets shall be distributed to the Members with positive Capital Accounts in proportion to their respective positive Capital Account balances. All distributions pursuant to this Section 11.5((d))((2)) shall be made no later than the end of the Company taxable year during which the liquidation of the Company occurs (or if later, within ninety (90) days after the date of such liquidation).

(3) *Indebtedness to Company.* If any Member is indebted to the Company, the Liquidator shall, until such Member has repaid the Company, retain such Member's distributive share of Company Property and apply it to the repayment of the

Member's indebtedness. The balance of the Member's distributive share shall be delivered to the Member.

11.6 **Termination of Company.** Upon the completion of the liquidation of the Company and the distribution of all Company assets, the Company's affairs shall terminate and the Members shall cause to be executed and filed a certificate of cancellation of the Company's certificate of formation pursuant to the Act, as well as any and all other documents required to effectuate the termination of the Company.

11.7 **No Obligation to Restore Deficit Capital Account Balance.** No Member has any obligation to restore a deficit balance in his or its Capital Account, or to make any Contributions to the Company in order to restore such deficit balance, or to make any Contribution to the capital of the Company solely by reason of such deficit Capital Account balance. Any deficit balance in a Member's Capital Account shall not be considered an asset of the Company or of any Member.

12. EXEMPT WHOLESALE GENERATOR STATUS

12.1 **Exempt Wholesale Generator.** The Members intend that the Company meet the requirements of an Exempt Wholesale Generator. Therefore, the Members shall undertake any and all actions that are reasonably necessary for the Company to meet the requirements of an Exempt Wholesale Generator. Under no circumstances shall any Member or the Company take or consent to be taken any action which would cause (a) the Company to fail to satisfy the criteria of an Exempt Wholesale Generator, or (b) the Company to have Prohibited Utility Status. All Persons owning an Interest in the Company shall take any and all action reasonably necessary to maintain the Project's classification as an Eligible Facility and the Company's classification as an Exempt Wholesale Generator.

12.2 **Remedial Measures.** If any Member causes the loss of Exempt Wholesale Generator status, then that Member shall take such action as may be reasonably necessary to bring the Company back within the requirements of an Exempt Wholesale Generator so long as the action required under this Section 12.2 does not materially and adversely affect the Company, any Member or the Project or cause a default under any Material Contracts.

13. REPRESENTATIONS AND WARRANTIES OF MEMBERS

Each Member hereby represents and warrants as of the Execution Date as follows:

13.1 **Due Organization.** Such Member is a corporation, partnership or limited liability company, as the case may be, duly organized, validly existing and in good standing under the laws of its respective state of formation, and is qualified to transact business in all jurisdictions where the ownership of its properties or its operations require

such qualification, except where the failure to so qualify would not have a material adverse effect on its financial condition or on its ability to own its properties or transact its business.

13.2 **Authority.** Such Member has the corporate or partnership or limited liability company power and authority to enter into and perform its obligations hereunder and to consummate the transactions herein contemplated in accordance with the terms, provisions and conditions hereof. All corporate or partnership or limited liability company proceedings required to be taken by such Member to authorize it to execute, deliver and perform the terms of this Agreement have been taken.

13.3 **Valid and Binding Obligations.** This Agreement has been duly and validly executed by such Member and constitutes a valid, binding, and enforceable obligation, enforceable against such Member in accordance with its terms, except as such enforceability may be limited or denied by (a) applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors' rights and the enforcement of debtors' obligations generally and (b) general principles of equity, regardless of whether enforcement is pursuant to a proceeding in equity or at law.

13.4 **No Consents or Violations.** The execution, delivery and performance of this Agreement by such Member will not (a) except for the consents for such Member which have been duly obtained, require the consent of any Person, (b) violate the charter documents of such Member, (c) violate, or be in conflict with, or constitute a material default or event of default under, or cause or permit the acceleration of the maturity of, or give rise to any right of termination under, any material debt, obligation, contract, commitment or other agreement to which such Member is a party or by which any of its properties or assets is or may be bound, which event would have a material adverse effect on the financial condition of such Member or the ability of such Member to fulfill its obligations hereunder, or (d) result in the creation or imposition of any lien or encumbrance upon the Interest held or acquired by such Member.

13.5 **No Litigation.** There are no actions, suits or proceedings pending or, to each Member's knowledge, threatened at law or in equity before any court, arbitrator, or administrative or governmental officer or governmental Person to which such Member is or, to such Member's knowledge, may become a party, which event would have a material adverse effect on the financial condition of such Member or the ability of such Member to fulfill its obligations hereunder.

14. UCC ELECTION: ISSUANCE OF CERTIFICATES

14.1 **UCC Article 8 Election.** The Company hereby irrevocably elects that all Company Interests shall be securities governed by Article 8 of the Uniform Commercial Code as in effect in the State of Delaware. Each certificate evidencing Company

Interests, if certificates are issued, shall bear, in addition to the legends described below in Section 14.2, the following legend:

> This Certificate evidences an Interest in Front Range, LLC, and shall be a security for purposes of Article 8 of the Uniform Commercial Code as in effect in the State of Delaware.

No change to this provision shall be effective until all outstanding certificates have been surrendered for cancellation and any new certificates thereafter issued shall not bear the foregoing legend.

14.2 **Form of Interest Certificates.** If the Manager deems it necessary or appropriate for the Membership Interests of the Company to be evidenced by a physical instrument, it may adopt a form of Interest Certificate to represent the Membership Interests. Each Interest Certificate shall be signed in the name of the Company by the Manager and shall certify the number of Membership Interests owned by the respective Member. Any or all of the signatures on an Interest Certificate may be facsimile. There shall also appear conspicuously on the Interest Certificates (i) a statement to the effect that the Interests are subject to restrictions upon transfer, and (ii) any required federal or state securities legends.

14.3 **Issuance of Interest Certificates.** If a form of Interest Certificates has been adopted by the Manager, each Member shall be entitled to be issued an Interest Certificate certifying the number of Interests owned by the Member. The Interest Certificates shall be deemed issued when signed by the Manager on behalf of the Company and delivered to the Members or their Assignees. If the Manager elects to adopt Interest Certificates, Members may transfer their Interests only by endorsing and delivering to Assignees the Interest Certificate relating to their Interests, subject, however, to the additional requirements of this Agreement. If the endorsement is on a separate document, Members must deliver to Assignees both the document and the Interest Certificate relating to their Interests. The Manager may, in addition, designate a transfer agent, and require that all assignments or Transfers of Interests be made only through such transfer agent.

14.4 **Lost, Stolen, or Destroyed Interest Certificates.** The Company may issue a new Interest Certificate in place of any previously issued Interest Certificate alleged to have been lost, stolen, or destroyed, and the Manager may require the Member owning the lost, stolen, or destroyed Interest Certificate (or the Member's legal representative) to give the Company a bond (or other adequate security) sufficient to indemnify it against any claim that may be made against it (including any expense or liability) on account of the alleged loss, theft or destruction of any Interest Certificate or the issuance of the new Certificate.

14.5 **Surrender and Cancellation of Certificates.** When this Agreement is amended in any way affecting the statements contained in any Interest Certificate representing outstanding Interests, or it otherwise becomes desirable for any reason, at the discretion of the Manager, to cancel any outstanding Interest Certificate and to issue a new Interest Certificate therefor conforming to the rights of the Member that is the holder of the Interest Certificate, the Manager may order any Members holding an outstanding Interest Certificate to surrender and exchange them within a reasonable time to be fixed by the Manager.

15. MISCELLANEOUS PROVISIONS

15.1 **Disclaimer of Agency.** This Agreement shall not constitute any Member the legal representative or agent of the other, nor shall any Member have the right or authority to assume, create or incur any liability or obligation, express or implied, against, in the name of or on behalf of any other Member or the Company.

15.2 **Amendment.** Except for an amendment specifically authorized herein, any amendment to this Agreement must be in writing and approved by each Member.

15.3 **Consequential Damages.** Neither the Company nor any Member shall be liable to any other Member or the Company for special, indirect or consequential damages resulting or arising out of this Agreement, including loss of profit; provided, however, that this Section 15.3 shall not diminish the effects of Section 6.10 regarding indemnification.

15.4 **Counterparts.** The Members may execute this Agreement in two or more counterparts, which shall, in the aggregate, be signed by all the Members. Each counterpart shall be deemed an original instrument as against any Member who has signed it.

15.5 **Governing Law.** THE LAWS OF THE STATE OF DELAWARE SHALL GOVERN THE CONSTRUCTION, INTERPRETATION AND EFFECT OF THIS AGREEMENT.

15.6 **Binding Effect.** This Agreement shall be binding on all successors and assigns of the Members and inure to the benefit of the respective permitted successors and assigns of the Members, except to the extent of any express contrary provision in this Agreement.

15.7 **Partial Invalidity.** If any term, provision, covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the rest of this Agreement shall remain in full force and effect and shall in no way be affected, impaired, or invalidated.

15.8 **Captions.** Titles or captions of Sections or Articles contained in this Agreement are inserted only as a matter of convenience and for reference, and in no way define, limit, extend or describe the scope of this Agreement or the intent of any provision hereof.

15.9 **Entire Agreement.** This Agreement contains the entire agreement of the Members relating to the rights granted and obligations assumed in this Agreement. Any oral representation or modifications concerning this Agreement shall be of no force or effect unless contained in a subsequent written modification signed by the party to be charged.

15.10 **No Rights in Third Parties.** The provisions of this Agreement are for the benefit of the Company and the Members, and are not intended to be for the benefit of any Person to whom any debts, liabilities or obligations are owed, or who otherwise has any claim against the Company or any Member, and no creditor or other Person shall obtain any rights under such provisions or solely by reason of such provisions shall be able to make any claims in respect of any debts, liabilities or obligations against the Company or any of the Members.

15.11 **No Right to Partition.** No Member shall have the right to bring an action for partition against the Company. Each of the Members hereby irrevocably waives any and all rights which it may have to maintain an action to partition Company property or to compel any sale or transfer thereof.

15.12 **No Title to Company Property.** All Property owned by the Company, whether real, personal or mixed, and whether tangible or intangible, shall be deemed to be owned by the Company as an entity, and no Member, individually, shall have any ownership interest in such Property.

15.13 **Additional Documents.** Each party hereto agrees to execute, with acknowledgment or affidavit, if required or deemed appropriate, any and all documents and writings which may be necessary or expedient in connection with the creation of the Company and the achievement of its Purpose, specifically including such certificates and other documents as the Manager reasonably deems necessary or appropriate to form, qualify or continue the Company as a limited liability company in all jurisdictions in which the Company conducts or plans to conduct business.

15.14 **Members Not Named.** Unless named in this Agreement, or unless admitted to the Company as a Member, as provided in this Agreement, no Person shall be considered a Member. Subject to rights granted to Assignees hereunder or under the Act, the Company and the Members need deal only with Persons so named or admitted as Members; provided, however, that any distribution by the Company to the Person shown on the Company records as a Member or its legal representative or the Assignee of the right to receive Company distributions as herein provided, shall relieve the Company and

the Members of all liability to any other Person who may be interested in such distribution by reason of any other assignment by the Member or by reason of its death, Bankruptcy, incompetency, or for any other reason.

15.15 **Confidentiality of Information.** The Members acknowledge that they may receive information regarding the Company in the nature of trade secrets or that otherwise is confidential, the release of which may be damaging to the Company or Persons with which it does business. Each Member shall hold in strict confidence any information it receives regarding the Company that is identified as being confidential (and if that information is provided in writing, that is so marked) and may not disclose it to any Person other than another Member, except for disclosures (a) compelled by law (but the Member must notify the Manager promptly of any request for that information, before disclosing it, if practicable), (b) to advisers or representatives of the Member, who have a legitimate need to know such information, and have been advised of the provisions of this Section and the confidential nature of the information, or (c) of information that the Member also has received from a source independent of the Company that the Member reasonably believes obtained that information without breach of any obligation of confidentiality. The Members acknowledge that breach of the provisions of this Section may cause irreparable injury to the Company and the Members for which monetary damages are inadequate, difficult to compute, or both. Accordingly, the Members agree that the provisions of this Section may be enforced by specific performance.

15.16 **Notices.** Any written notice or communication to any of the Members required or permitted under this Agreement shall be deemed to have been duly given and received (a) on the date of service, if served personally or sent by telex or facsimile transmission (with appropriate confirmation of receipt) to the party to whom notice is to be given, or (b) on the fourth (4th) day after mailing, if mailed by first class registered or certified mail, postage prepaid, and addressed to the party to whom notice is to be given at the address as set forth below, or at the most recent address specified by written notice given to the other Members, or (c) on the next day if sent by a nationally recognized courier for next day service and so addressed and if there is evidence of acceptance by receipt. Notices to the Company shall be similarly given, and addressed to it at its principal place of business.

If to FRH: FR Holdings, L.L.C.
370 Van Garden Street
Lakewood, Colorado 80228-8304
Attention: Philip K. Smith

If to QMH: Quixx Mountain Holdings, LLC
Amarillo National's Plaza/Two
500 S. Taylor, Suite 1100, LB 254
Amarillo, Texas 79101-2442
Attention: James D. Steinhilper

15.17 **Breach of Agreement by Member.** A Member who is in breach of this Agreement shall be liable to the Company for damages caused by the breach. The Company may offset for the damages against any distributions or return of capital to the Member who has breached this Agreement.

IN WITNESS WHEREOF, the Members have executed this Agreement on the _____ day of _____, 1999.

MEMBERS:

QUIXX MOUNTAIN HOLDINGS, LLC

By:_____
Name: James D. Steinhilper
Title: President

FR HOLDINGS, L.L.C.

By:_____
Name: Phil K. Smith
Title: Vice President

SCHEDULE A

NAMES, ADDRESSES, CAPITAL CONTRIBUTIONS, AND INITIAL SHARING RATIOS OF THE MEMBERS

NAMES AND ADDRESSES	INITIAL CAPITAL CONTRIBUTIONS	INITIAL SHARING RATIOS
Quixx Mountain Holdings, LLC	$49.00	49%
FRH Holdings, L.L.C.	$51.00	51%

In addition to the Capital Contributions set forth above, the Members shall make the Capital Contributions Approved by the Manager and the Members, or provided for, when agreed upon and executed, in the Funding Agreement.

SCHEDULE B

DESIGNATION OF MEMBERS REPRESENTATIVES

Members	Name of Representative
Quixx Mountain Holdings, LLC	Representative: Mel Murphy Alternate Representative: Ross McCausland
FRH Holdings, LLC	Representative: Phil K. Smith Alternate Representative: Jay Hopper

K N Energy, Inc.
370 Van Gordon Street
P.O. Box 281304
Lakewood, CO 80228-8304
(303) 989-1740

September 27, 1999

Richard Long
United States Environmental Protection Agency
Region VIII
999 18th Street
Suite 500
Denver, Colorado 80202-2466

Re: Front Range Energy Associates, LLC
Single/Separate Source Question

Dear Mr. Long:

On behalf of Front Range Energy Associates, LLC ("Front Range"), I would like to thank you and your staff for meeting with representatives of Front Range on Wednesday, September 22nd. We appreciate the opportunity to discuss air permitting issues related to the proposed Front Range generating facility located near Fort Lupton Colorado. The Front Range facility is an important part of the resource acquisition program prepared by Public Service Company of Colorado ("PSCo") to meet growing energy demands in the Denver Metropolitan area. We are grateful that EPA is willing to work with us on an expedited basis to resolve the Front Range permitting issues and to help prevent a reoccurrence of the power shortages Denver experienced during the summer of 1998.

In particular, we believe it was useful to list the factors that the Region considers pertinent to a determination whether the proposed Front Range facility and the nearby PSCo station are under "common control" for purposes of the definition of "stationary source" in the PSD regulations. It also was useful to reach what we believe was the Region's agreement that these determinations are made on a case-by-case basis because they require a review of the unique circumstances of the facilities involved. In our letter to you dated September 22, 1999, Front Range provided a discussion and supporting documentation of our position that the Front Range facility meets the criteria to be considered a separate source consistent with EPA and Colorado Department of Public Health and Environment ("CDPHE") memoranda/letters which, in different cases, have been deemed to provide guidance on the question of how to interpret the undefined term "common control." We understand that EPA uses the presence of these factors as indicators of "common control," and that the presence of any of these factors will cause EPA to review the particular circumstances of the sources in question to determine whether common control in fact exists. Critical in each of the "common control" determinations made by the EPA is the controlling relationship between the two specific facilities as individual or combined air pollutant emission sources. In no determination was the relationship between one facility, and the overall business enterprise of the owner of the other facility,

without reference to the operations of the individual pollutant-emitting facility itself, sufficient to demonstrate common control.

At our meeting, Region 8 articulated four factors as best defining the framework for a common control determination in this case. We understand the four factors Region 8 will focus on are as follows:

1. Common ownership which may create control;

2. Contractual arrangements which may create control over management, operations and internal policies;

3. Contracts for services which may create control; and

4. Support/Dependency ("but for" test) which may create control, e.g. Is there a symbiotic relationship between the facilities? Does one facility "support" the other such that if one facility ceased operations the second facility would fail?

NO COMMON CONTROL BY OWNERSHIP OR CONTRACTUAL POWERS

EPA appears to be concerned about two relationships involved in the Front Range facility: that between the PSCo facility and the Front Range facility, and that between Quixx Mountain Holdings, LLC ("QMH"), a member of Front Range, and Front Range. As we have discussed, Front Range is not a subsidiary of New Century Energies, Inc., the ultimate parent corporation of both PSCo and QMH, nor is it an affiliate of PSCo. PSCo does not own any interest in Front Range. Furthermore, no contractual relationship exists between PSCo and Front Range such that PSCo controls the day-to-day operations, the policies, or the management of Front Range. Thus, there is no common control between Front Range and PSCo established by ownership or by contractual arrangements over internal affairs.

In our prior letter and at the meeting, Front Range presented information and documents that we believe eliminate any question that Front Range can be controlled by QMH, a PSCO affiliate, through ownership interest and powers established under the provisions in the Limited Liability Company ("LLC") Agreement. Unlike the Region 2 Dupont guidance letter cited during our meeting, where Dupont presented no evidence regarding Dupont's power directly or indirectly to cause the direction or management and policies of DDE, we have presented significant evidence that QMH has no control over Front Range. As we have indicated, the QMH ownership interest and voting power within Front Range has been reduced to 49%, thus QMH not only does not own a majority interest, it also has no ability to control decisions through a "veto" power. Furthermore, the provisions of the LLC Agreement have been revised and restated to clearly remove QMH from operational and management decision-making. Front Range also has proposed to give assurances to the State and to the EPA, in the form of an enforceable permit condition, that the QMH ownership interest will

never exceed 49% and that the LLC will not be changed to increase control in QMH. Thus, we believe we have provided a "belt and suspenders" level of assurances in the LLC Agreement to ensure the agencies involved that there is and will be no control over the Front Range facility by PSCo through its affiliate, QMH.

NO COMMON CONTROL BY CONTRACT FOR SERVICES OR DEPENDENCY

In our meeting, we also responded to the Region's question as to whether the April 30, 1999 Power Supply Agreement (known as the "PPA") is a "contract-for service" which creates "common control" in the PSCo and FRH facilities. This is not a question of control by way of company structure, but by way of the marketplace. As we understand it, the question is whether a contract which requires that one entity sell all of its production to another entity, in effect, gives the second entity "control" over the first. We believe that application of the "contract-for-service" analysis is inappropriate in this case for two critical reasons.

First, all of the EPA guidance that we have found that has applied the "contract-for-service" test has focused on the relationship between "adjacent facilities" created by the "contract-for-service." (See November 12, 1998 letter from USEPA Region 8 to Colorado DPHE; February 20, 1998 letter from USEPA Region 4 to South Carolina DHEC; July 15, 1997 letter from USEPA Region 5 to Ohio EPA; September 18, 1995 letter from Region 7 to Iowa DNR; Undated 1998 or 1999 letter from USEPA Region 3 to Pennsylvania DEP regarding USN and NE Hub facilities; July 20, 1995 letter from USEPA Region 4 to Georgia DNR.) The PPA here creates no "dependency" relationship between the Front Range facility and the "adjacent" PSCo facility. Instead, the PPA is a contract to supply power to PSCo's transmission grid as a whole. The power sold to PSCo will not be used at the PSCo Fort Lupton station.

Second, we believe this would be the first time that EPA would apply the "contract-for-services" test to find common control in the context of the sale of power from an independent power producer to a regulated public utility. As discussed in our meeting, the only reason for the 100% service contract in this case is because of the unique posture of PSCo as a regulated public utility and, as a result, the only entity under Colorado law that can provide electricity to customers in its service territory. Thus, if its customers do not have adequate power, PSCo must acquire additional power resources from another party or build them itself. Under Public Utility Commission ("PUC") regulations, PSCo is required to request bids for new power resources in an integrated resource planning process. In this case, PSCo awarded the bid to Front Range under PUC rules. Today the Front Range facility cannot by law sell power to any other customer other than PSCo. Thus, the existence of a contract which reflects this relationship between the PSCo transmission business and the Front Range facility is not evidence that PSCo controls the Front Range facility. Similarly, the fact that PSCo has had to look to independent third party power producers to generate the additional electricity needed to service the power needs of the area was not an effort to break-up its operations to avoid pollution control laws, but rather has been mandated by the Colorado PUC. The "control" in this situation is in the hands of the State and its Public Utility Commission which have selected and

licensed PSCo as the sole provider of electricity in this area and have required that additional power be generated and that it be generated by independent entities. If the function of the "common control" test is to close a "loop hole" in the PSD program by preventing a single source from dividing up or selling off its operations to separate companies in order to circumvent the PSD permit requirements, that test is simply irrelevant in the context of a regulated, single utility state. In such cases, EPA should look beyond the mere existence of a single purchaser contract to determine whether there is "common control" between the individual facilities.

EPA appeared concerned at our meeting that because PSCo has discretion, within certain limitations, under the PPA to request when and how much power Front Range is to dispatch to PSCo, that PSCo somehow "controls" the Front Range facility. If this is the test for control, then all peaking power plants by definition are "controlled" by the utilities that they do business with. Electric power is not like tangible goods that can be placed on shelves and held in inventory until a customer requests their shipment. Electric power must be generated and fed into the transmission and distribution system at the time that it is needed. Under PUC order, PSCo was required to bid for additional peaking resources for those times when electric energy usage in Denver is especially high. For the most part, PSCo cannot store power generated by a peaking resource like Front Range for later use. To use the Front Range facility, PSCo must have the ability to order Front Range to generate the power when it is needed. In other words, as a practical and technical matter, PSCo must have the right to determine when the Front Range facility runs.

Under the PPA, it is Front Range's responsibility to comply with all environmental laws, and the PPA is clear that PSCo cannot demand that the facility generate power in a way that will require a violation of its air quality permit. If the Front Range facility is subject to a 249 ton per year NOx emission limitation, PSCo has no authority to demand that the facility run more frequently in a way that will result in a violation of this limitation. PSCo also has no authority to dictate any other operating practices of the facility. Thus, the fact that PSCo can demand power as needed in itself is not indicative of a power to so dominate Front Range that it should be considered a single source with the PSCo station under the PSD requirements.1

The critical question is whether the "contract-for-service" creates a relationship between the two "adjacent" facilities such that one is dependent on the operations of the other. The short answer to this question is that the Front Range facility is a completely "stand alone" facility that is not tied to and does not require goods or services from the facilities located on the adjacent PSCo property.

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1 We have pointed out that the provisions of the PPA are standard in the industry. For example, Section 10.5 which creates an "Operating Committee" on which PSCo has a representative is standard in any agreement for sale of power from a wholesaler to a retailer. As noted in Section 10.5, the function of that Committee is solely to develop written operating procedures which are "intended as a guide on how to integrate the [Front Range facility] and its electrical output into PSCo's system." These standard procedures are necessary to allow for the coordination of the delivery and receipt of the electricity generated by Front Range. These provisions do not create control by PSCo. In fact, Section 10.5 specifically states that PSCo is not an operator of the facility and has no responsibility for day-to-day operations. Similarly, in Section 18.3, PSCo's consent is required for the transfer of membership interest in Front Range. This, again, is a standard provision in contracts in this industry as the power purchaser has a justifiable interest in the qualifications of a power plant operator from which it buys power.

The circumstances surrounding the locations of the Front Range and PSCo "adjacent" facilities is very different from the "adjacent" facilities that are the subject matter of the various EPA letters and guidance documents.2 In every one of the EPA letters and guidance documents we have found there is some relationship between the goods or services produced at one facility and the goods or services produced at the other facility. Here there is no such relationship.

Significantly, the Front Range facility operates completely independently of the generators on the PSCo site. The Front Range facility does not use or depend upon the power generated at the PSCo station and the PSCo station does not use or depend upon the power generated from the Front Range facility. If the nearby PSCo facility did not exist, the Front Range facility would nonetheless be able to produce and transmit power, just as it is planning to. The natural gas pipelines running beneath the Front Range facility allow Front Range to obtain natural gas for fuel from alternate sources. Under Colorado law, Front Range would also be able to use PSCo's transmission lines for sales and transmission of power to purchasers of electricity other than PSCo. The viability of the Front Range facility independent from PSCo was the conclusion found in the market analysis of the project, prepared for the lender of the Front Range facility. This finding of independent viability was a critical element for the lender to agree to fund the Front Range project.

From the other perspective, the PSCo station is not dependent on, or supported by, the Front Range facility. The electricity generated at the Front Range facility is not used to support any operations or production on the adjacent property nor is it stored, processed, packaged or in any manner "serviced" at the "adjacent" PSCo facility. The Front Range generated electricity enters the PSCo transmission system at the point it leaves the Front Range facility via PSCo transmission lines for sale to and use by PSCo's thousands of customers. The decision to dispatch the Front Range facility is not made because of any requirements for power at the PSCo station, nor is the decision to dispatch made at the Fort Lupton PSCo station. Thus, the power generated from the Front Range facility is like any other product which is sold on a wholesale basis to a distributor for resale to its customers. Furthermore, the sale is not a sale to the adjacent facility, but to the PSCo transmission network. Neither the adjoining PSCo station nor the entire PSCo transmission network will fail if the Front Range Project does not exist.

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2 The location of the Front Range facility was chosen based upon the close proximity to alternative sources of natural gas and to transmission lines with sufficient capacity to transmit the power generated at the Front Range facility. The Front Range project, like all generating stations, needs access to a fuel supply, here in the form of a natural gas pipeline, and it needs access to transmission lines capable of transmitting its power to the load center. The decision to locate near the PSCo Fort Lupton station was not a requirement for the viability of the Front Range facility, but was made because of the presence of the transmission capacity lines and natural gas sources and the ease with which Front Range can purchase the property on which it will locate from the KN Energy, Inc. affiliate. Locating the Front Range facility near the PSCo station was not a requirement for the operations of either facility, or for the viability of the Front Range project, and is in large part a mere coincidence

CONCLUSION

As the above discussion demonstrates, the factors designed to demonstrate common control between adjacent facilities are simply not present here. Unlike the Dupont matter, no voting ownership, or contractual control exists between PSCo and Front Range, or between QMH and Front Range. Unlike the Trigen Power Plant and the Coors Brewery situation, PSCo does not depend on the Front Range facility to supply all of the power needed by PSCo, Front Range is not dependent on the PSCo station, there is no dependency between the facilities for pollution control, the Front Range facility is not located on PSCo owned property or on property leased from PSCo. Although all power generated for the first seven years of the approximately 30 to 40 year life of the Front Range facility will be sold to PSCo, Front Range has contracted for the sale of its power to a different purchaser, e prime, beginning the eighth year of its operation. Although an affiliate of PSCo, e prime has no ownership interest in, nor does it operate the PSCo Fort Lupton facility. Moreover, during the second half of the project's life, Front Range anticipates (and, indeed, is counting on) the restructuring of the Colorado electric industry so that it can sell power to any customer that will pay it the right price.

Where, as here, there is no evidence of direct control, the EPA looks at many factors to determine whether there is common control between two sources. In our review of EPA guidance and letters, in the absence of direct control, EPA relied on no one factor alone to make a finding of common control. Rather, a finding of common control was made only after EPA found evidence of the presence of number of common control factors. The absence of factors of common control in this case, we believe, should lead EPA to the conclusion that the proposed Front Range facility and the existing PSCo Fort Lupton station are not under common control.

Significantly, there are two fundamental differences between this case and all other EPA determinations of common control available for review. First, finding common control here would be the first time EPA has made such a finding where there is no relationship between the adjacent facilities. Region 8's attention on the business relationship between the Front Range facility and PSCo as a whole, without regard to the PSCo station, is an unnecessary departure from traditional application of the "contract-for-services" test. Second, finding common control here would be the first time EPA has made such a finding because of the specific contractual relationship mandated by public utility law. A determination based upon either of these findings has significant national ramifications that go well beyond the reasoning behind the common control test.

We appreciate EPA's willingness to consider these issues on an expedited basis. We thank EPA for its recognition of the importance of the Front Range facility not only to the companies involved, but, more importantly, to the people of the metropolitan area. Please let me know if you

have any questions. We look forward to hearing from you.

Sincerely,

Martha E. Rudolph
Assistant General Counsel

cc: Terry Lucas, USEPA
Jonah Staller, USEPA
David Ouimette, APCD
Jill Cooper, APCD
Dennis Myers, APCD
Casey Shpall, Colorado AGO

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Ref: 8P-AR

Ms. Margie Perkins, Director
Air Pollution Control Division
Colorado Department of Public Health and Environment
4300 Cherry Creek Drive South
Denver, CO 80246-1530

Re: Pending Permit for Front Range Energy Associates, LLC

Dear Ms. Perkins:

We have determined that the proposed power generating facility at Fort Lupton to be constructed by Front Range Energy Associates, LLC ("Front Range") and the existing adjacent generating facility owned by Public Service Company of Colorado ("PSCo") constitute a single source for purposes of permitting under the prevention of significant deterioration ("PSD") program of the Clean Air Act ("Act"), 42 U.S.C. § 7401 *et seq.* The existing PSCo facility is a major stationary source, as defined by Environmental Protection Agency ("EPA") regulations at 40 C.F.R. § 51.166. The Front Range facility, as currently proposed, would be a major modification of the major stationary source, under the same regulations. As such, it is subject to PSD permit requirements under both EPA regulations and Colorado Air Quality Control Commission regulations (Air Quality Control Regulation 3, Part B). Enclosed is a letter to Martha Rudolph, attorney for KN Energy, Inc. ("KN"), one of the owners of Front Range, explaining our determination.

We understand that you have signed a construction permit to be issued to KN, limiting emissions of the Front Range facility to just less than 250 tons per year each of nitrogen dioxide and sulfur dioxide. Significance levels for these pollutants are 40 tons per year each. Thus the construction permit will not serve to make this major modification a synthetic minor modification, subject to minor new source review. PSD will still be triggered for this facility. If Colorado issues the signed permit to the applicant, the State will not be acting in compliance with requirements of the Act relating to the construction and modification of new sources. EPA Region VIII is considering what action to take to prevent such non-compliance, including issuing a finding of non-compliance under section 113(a)(5) of the Act (42 U.S.C. § 7413(a)(5)) and issuing an order to prohibit construction of a source in violation of PSD requirements under section 167 of the Act (42 U.S.C. § 7477).

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I look forward to discussing these issues with you. Do not hesitate to call me at your earliest convenience.

Sincerely,

Richard R. Long
Director,
Air and RadiationPrograms

Enclosure

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Ref: 8P-AR

Martha E. Rudolph
Assistant General Counsel
KN Energy, Inc.
370 VanGordon Street
P.O. Box 381304
Lakewood, CO 80228-8304

Re: Source Determination for Front Range Energy Associates, LLC, Generating Facility

Dear Ms. Rudolph:

We appreciate having the opportunity to meet with you and other representatives of KN Energy, Inc. and Quixx Corporation on September 22, 1999. We have reviewed the information you presented in the meeting and in your letters, dated September 22 and 27, 1999, and the documents you provided. We conclude that the proposed power generating facility at Fort Lupton to be constructed by Front Range Energy Associates ("Front Range") and the existing generating facility at Fort Lupton owned by Public Service Company of Colorado ("PSCo") constitute a single source for purposes of permitting under the prevention of significant deterioration ("PSD") program of the Clean Air Act ("Act") (42 U.S.C. § 7401 *et seq.*, § 7475). In accordance with Environmental Protection Agency ("EPA") regulations at 40 C.F.R. § 51.166, the PSCo facility is a major source for PSD; the Front Range facility, if constructed as proposed, would be a major modification of this major source. Therefore, the Front Range facility is subject to the requirement to obtain a PSD permit in accordance with section 165 of the Act and 40 C.F.R. § 51.166(i) through (r).

The operative definitions for "major stationary source" and "stationary source" in 40 C.F.R.§ 51.166(b) include the following provision:

> (6) *Building, structure, facility, or installation* means all of the pollutant emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control).

We understand there to be no dispute that the Front Range facility belongs to the same industrial grouping as the PSCo facility and that the two facilities are located on adjacent properties. The issue is whether the two facilities are under the control of the same person or persons under

common control. We believe that they are. Our analysis supports a finding that control by PSCo is established by the power supply agreement between Front Range and PSCo which obligates Front Range to provide electricity to PSCo on demand. Control is also indicated by ownership interest in Front Range held by PSCo's parent company, New Century Energies, Inc. Because the pollutant emitting activities of Front Range and PSCo are under the control of the same person, or persons under common control, the two facilities should be treated as a single source for purposes of regulation under the Act. Our analysis follows.

1. PSCo has control over the Front Range facility through contract: EPA regulations do not supply a definition of "control." Instead, EPA is guided in making case-by-case source determinations by the definition of "control" found in the regulations of the Securities and Exchange Commission ("SEC"). See 45 Fed. Reg. 59874, 59878 (Sept. 11, 1980). The SEC definition provides:

> Control is the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person (or organization or association) whether through the ownership of voting shares, contract, or otherwise.

17 C.F.R. § 240.12b-2. EPA has applied this guiding definition in numerous determinations over the past nineteen years. First, EPA looks to see if control has been established through ownership of two entities by the same parent corporation or subsidiary of the parent corporation. EPA then considers whether control has been established by a contractual arrangement giving one entity decision-making authority over the operations of a second entity. EPA also looks for a contract for service relationship between two entities, in which one sells all of its product to the other under a single purchaser contract. Finally, EPA considers whether there is a support or dependency relationship between the two entities, such that one would not exist "but for" the other. Such determinations are factually driven. We believe that the facts related to the proposed Front Range facility evidence control both through ownership and through contract. Because the latter has created a somewhat unusual relationship and because the evidence supporting this relationship is particularly compelling, we will discuss control through contract first.

Front Range has a power supply agreement with PSCo (dated April 30, 1999) to provide "all the net generating capacity available at any time at the [Front Range] Facility" to PSCo. For the next seven years, Front Range may not sell its power to anyone other than PSCo. The Front Range facility is a "peaking station," which will provide all the power it can generate and all that PSCo requires at times of high electricity use, in order to prevent "brown-outs" in the Denver metropolitan area. The facility has no other function than to supply power to PSCo during such times. Under the agreement, PSCo will pay Front Range an amount sufficient to guarantee a profit, even if the facility sits idle and is never used.

In addition to this evidence of a dependent buyer-seller relationship based on a single purchaser contract, there is evidence that PSCo has the authority under the agreement to exert direct control over operations of the Front Range facility. The power supply contract provides that PSCo's system-wide control center has "the sole right" to determine start-up, shut-down, and levels of electricity generation at the Front Range facility. To that end, a direct connection will be

established between PSCo's system-wide control center and the Front Range facility that will allow the facility to be "remotely started and stopped" by PSCo. PSCo thus will exert decision-making authority over the day-to-day operations of the Front Range facility. Moreover, the facility must be sited to allow PSCo to easily interconnect the facility into PSCo's power transmission system, requiring the facility to be collocated with or located near an existing PSCo facility. PSCo will supply all the fuel (natural gas) to be used at the Front Range facility, free of charge to Front Range. Front Range will rely on PSCo to provide interconnection to PSCo's existing gas pipelines, as well as to PSCo's transmission lines. Thus, Front Range is dependent on PSCo for its fuel as well as for purchase and delivery of its product.

Given these facts, EPA determines that generation of electrical power at the Front Range facility -- the essential function of the facility and the source of its air pollution emissions -- is under the control of PSCo. PSCo exerts control over Front Range, as that word is defined by SEC regulation and has been applied by EPA in prior source determinations.

One could draw an analogy to a manufacturer who decides to increase production but, instead of adding additional production capability to its existing plant, contracts with another company to build a second plant next door. For example, Company A, which paints widgets, might wish to increase its output of painted widgets at times of high demand. Company A contracts with Company B to build two new painting lines on adjacent property owned by Company B. Company A will buy all of Company B's output, but Company B may only paint widgets when ordered by Company A. Furthermore, Company A supplies all the paint and all the widgets to be painted by Company B. Company A controls both input and output. To make the agreement workable, Company A pays Company B a certain amount for sitting idle in between rush orders. In essence, Company A is contracting to use Company B's paint lines, like leasing a vehicle. Alternatively, one could say that Company B is an annex to Company A, an adjunct facility that allows Company A to increase production at a nearby site. If there were no contract, one could say that Company B's facility is independent of Company A's, that it has the capability of painting and selling widgets to other customers. That it "stands alone." But, given the contract between the two, Company A has control over Company B's painting activities and thus over its air polluting activities. In terms of air pollution control regulation, Company B's facility must be considered part of Company A's facility.

Similarly, PSCo needs to add electrical generating capacity, apparently under an order by the Colorado Public Utilities Commission ("PUC"). Rather than build a peaking station at the existing Fort Lupton facility, PSCo has contracted with Front Range to build and operate a peaking station several hundred yards away. PSCo will determine when power must be generated at the new facility and will purchase all the power. PSCo will determine when the new facility will be started up, when it will be shut down, and at what levels it will generate electricity. PSCo will not only relay orders to Front Range, to bring the new facility on line or take it down, but will have the ability to start and stop operation of Front Range at any time by throwing a switch at PSCo's own remote control center. Since PSCo has the power to determine when the Front Range facility will operate and at what levels it will generate electricity, PSCo controls the emission of pollutants from the facility. PSCo therefore has the "power to direct or cause the direction of the management and policies" of another entity with respect to the very activities

which the Clean Air Act regulates, that is, with respect to the other entity's "pollutant emitting activities."

We believe that the facts presented strongly support a finding that PSCo controls Front Range through the power supply agreement. Because PSCO exerts such control, the Front Range facility is properly considered part of the PSCo facility.

2. PSCo and Front Range are under the control of persons under common control:

Front Range is a limited liability company, which is owned by two entities, FR Holdings ("FR") and Quixx Mountain Holdings ("Quixx"). FR, in turn is a wholly-owned subsidiary of KN Power Company, which is a wholly-owned subsidiary of KN Energy, Inc. On the other side of the company, Quixx is a subsidiary of Quixx Corporation, which is a subsidiary of New Century Energies, Inc ("New Century"). New Century is also the parent company of PSCo, which is its wholly-owned subsidiary. Thus, the same parent company owns PSCo and one of the two owners of Front Range. As discussed above, control may be established by ownership by the same parent company or by a subsidiary of the parent company.

Here, as in the case of Dupont and Dupont Dow Elastomers,[1] EPA agrees that Front Range may not be considered a subsidiary of New Century or of one of its subsidiaries. However, a contractual relationship has been established between a New Century subsidiary, Quixx, and another entity, FR, through the limited liability company agreement that created Front Range. We believe that the current ownership relationship of the two parties is 50 percent /50 percent, but that the agreement may be amended to create a 49 percent/51 percent relationship. Under the amended agreement, Quixx would have 49 percent voting interest, presumably to eliminate its ability to veto decisions by FR, the managing entity. The agreement may be amended again, to create a 49 percent/ 49 percent/ two percent relationship with a third unnamed party, giving neither major owner voting control or veto power, but reinstating equal interest between the two.

As noted before, the determination whether two facilities should be treated as a single source is factually driven. Percentage of voting interest is important, but is not the sole criterion. EPA guidance published in 1979 indicates that an ownership interest as low as 10 percent may result in control, while ownership of 50 percent necessarily results in control. See 44 Fed. Reg. 3279 (January 16, 1979). Other criteria must be considered. According to the limited liability company agreement (which is unsigned), FR is the "sole manager" of the Front Range project. It appears from this agreement that Quixx has been removed from management of day-to-day operations at the facility, particularly with respect to pollution control. As we have discussed, however, the power supply agreement already gives PSCo significant authority over facility operations. It appears that even the "sole manager" (FR) has little ability to manage actual operations of the facility, being limited to ministerial management of personnel and contracts and maintenance of the facility. Limiting Quixx's authority in this sphere may be of relatively little significance. Its parent company already has the control with which we are concerned.

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[1] See letter from Steven C. Riva, Region 2 Air Programs Branch Permitting Chief, to Michael L. Rodburg, Esq. (November 25, 1997).

Other pertinent facts we find problematic are that the limited liability agreement may be amended by agreement of the two owners, FR and Quixx. Presumably such amendment could include lifting the limitation on Quixx's involvement in operations. Furthermore, the manager of operations, now FR, may be removed for cause by the unanimous vote of the non-manager owners. At present, Quixx is the only non-manager owner.

The fact is that the Front Range project is dependent on both owners, FR and Quixx, who have undertaken to construct and operate an emitting facility and who, singly or together, may decide to disband the company, sell the property, declare bankruptcy, or make any other decision related to the existence or nonexistence of the project. The provisions of the agreement that wall off the Quixx side of the company from any authority over contracting with PSCo may satisfy PUC requirements, but similar walling-off with respect to operations may have no effect for purposes of PSD permitting. For PSD applicability, the issue is whether these two facilities are so separate in structure and control that their emissions should not be considered those of a single source; or, whether, in fact, an appearance of separate status is contradicted by actual connection(s) so significant and so intrinsic that the two should be treated as a single source of air pollution. We believe the latter is the case.

Even if control were not established solely through ownership, the power supply agreement creates a contractual relationship that confers direct control on PSCo. PSCo and Quixx are subsidiaries of the same parent company. The linkages between them and between PSCo and Front Range establish common control between Front Range and PSCo. Because the Front Range and PSCo facilities are under common control, as defined by the SEC regulations, have the same first 2-digit SIC code, and are contiguous; and because the existing PSCo facility has potential emissions exceeding the PSD major source threshold of 250 tons per year and the new Front Range facility will have potential emissions exceeding the PSD significance levels of 40 tons per year of nitrogen dioxide and of sulfur dioxide, they together constitute a single major stationary source, of which Front Range is a major modification for purposes of PSD applicability.

You have urged EPA to consider this proposed facility differently than other adjacent sources with close connections through contract or ownership. Because of the regulated environment in which Front Range operates and in which PSCo has sole right to purchase and distribute power, you ask us to use a different set of criteria for determining when one entity exerts so much control over another that two facilities may be considered a single source. It may be that the nature of utility regulation in Colorado makes our finding a foregone conclusion in this case -- or in any other where a generating facility locates near an existing power plant to which it is linked by ownership and control. That does not mean that the conclusion is an incorrect one. The purpose of the PSD program is to assure that industrial development will only be allowed in clean air areas when it is controlled in such a way as to minimize impacts of air pollution and preserve clean air resources. The criteria for source determination, developed through regulation, guidance, and many years of application, help assure that outcome. The result in this case is that

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PSD will be triggered for the Front Range project, unless Front Range takes a permit that effectively limits its potential to emit below the significance levels of 40 tons per year for nitrogen dioxide and sulfur dioxide and 15 tons per year for particulate matter.

Sincerely,

Richard R. Long
Director
Air and Radiation Programs

cc: Margie Perkins, Colorado APCD
Frank Prager, PSCo

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OCT - 1 1999

Ref: 8P-AR

Martha E. Rudolph
Assistant General Counsel
KN Energy, Inc.
370 VanGordon Street
P.O. Box 381304
Lakewood, CO 80228-8304

Re: Source Definition Issue for KN Power/Front Range Energy Associates, LLC/PSCo Generating Facility

Dear Ms. Rudolph:

We appreciate having the opportunity to meet with you and other representatives of KN Energy, Inc.(KN) and Quixx Corporation on September 22, 1999. We have reviewed the information presented at the meeting, in your letters dated September 22 and 27, 1999, and in the documents you provided. It is our interpretation that the proposed power generating facility at Fort Lupton (Facility) to be constructed by Front Range Energy Associates (Front Range) and the existing generating facility at Fort Lupton owned by Public Service Company of Colorado (PSCo) constitute a single source for purposes of permitting under the prevention of significant deterioration (PSD) program of the Clean Air Act (42 U.S.C. § 7401 *et seq.*) and U.S. Environmental Protection Agency (EPA) regulations at 40 C.F.R. section 51.166. The enclosed copy of our letter to Margie Perkins of the Air Pollution Control Division (APCD) of the Colorado Department of Public Health and Environment explains the basis for our interpretation.

If you have any questions about our interpretation, you may call Meredith Bond of my staff (303-312-6438) or Terry Lukas of the Office of Regional Counsel (303-312-6898).

Sincerely,

Richard R. Long, Director
Air and Radiation Program

Enclosure

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OCT - 1 1999

Ref: 8P-AR

Ms. Margie Perkins, Director
Air Pollution Control Division
Colorado Department of Public Health Environment
4300 Cherry Creek Drive South
Denver, CO 80246-1530

Re: Source Definition Issue for KN Power/Front Range Energy Associates, LLC/PSCo Generating Facility

Dear Ms. Perkins:

This letter outlines the U.S. Environmental Protection Agency's (EPA's) views on whether the proposed power generating facility at Fort Lupton (Facility) to be constructed by Front Range Energy Associates (Front Range) and the existing generating facility at Fort Lupton owned by Public Service Company of Colorado (PSCo) constitute a single source for purposes of permitting under the prevention of significant deterioration (PSD) program of the Clean Air Act ("Act") (42 U.S.C. § 7401 *et seq.*, § 7475). We have reviewed information presented by KN Energy, Inc. and Quixx Corporation, the two owners of Front Range, in letters, in documents, and in the meeting we held with the companies, the Colorado Air Pollution Control Division (APCD), and the state Attorney General's office on September 22, 1999. Based on this review, it is our interpretation of the PSD regulations that the Facility and existing PSCo generating facility constitute a single source. As the PSCo facility is a major source for PSD, see 40 C.F.R. § 51.166, it is also our interpretation of the relevant regulations that the Facility, if constructed as proposed, would be a major modification of this major source and therefore, is subject to the requirement to obtain a PSD permit in accordance with section 165 of the Act and 40 C.F.R. § 51.166(i) through (r).

The operative definitions for "major stationary source" and "stationary source" in 40 C.F.R.§ 51.166(b) include the following provision:

> (6) *Building, structure, facility, or installation* means all of the pollutant emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control).

See also, Colorado Air Quality Control Commission Regulation 3.Part A.I.B.59 ("Source Definitions"). We understand there to be no dispute that the Facility belongs to the same industrial grouping as the PSCo facility and that the two facilities are located on adjacent properties. The issue is whether the two facilities are under the control of the same person. We believe that they are. Our analysis supports a finding that control by PSCo is established by the power supply agreement between Front Range and PSCo which obligates Front Range to provide electricity to PSCo on demand. Control is also indicated by ownership interest in the Facility held by PSCo's parent company, New Century Energies, Inc. Because the pollutant emitting activities of the Facility and the existing PSCo facility are under the control of the same person, or persons under common control, the two facilities should be treated as a single source for purposes of regulation under the Act. Our analysis follows.

1. PSCo has control over the Facility through contract: EPA regulations do not supply a definition of "control." Instead, EPA is guided in making case-by-case source determinations by the definition of "control" found in the regulations of the Securities and Exchange Commission (SEC"). See 45 Fed. Reg. 59874, 59878 (Sept. 11, 1980). The SEC definition provides:

> Control is the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person (or organization or association) whether through the ownership of voting shares, contract, or otherwise.

17 C.F.R. § 240.12b-2. EPA has applied this guiding definition in numerous determinations over the past nineteen years. In the past, EPA has looked to see if control has been established through ownership of two entities by the same parent corporation or subsidiary of the parent corporation. EPA has also considered whether control has been established by a contractual arrangement giving one entity decision-making authority over the operations of a second entity. EPA also has looked for a contract for service relationship between two entities, in which one sells all of its product to the other under a single purchaser contract. Finally, EPA has considered whether there is a support or dependency relationship between the two entities, such that one would not exist "but for" the other. Such determinations are factually driven. We believe that the facts related to the proposed Facility evidence control through contract.

Front Range has a power supply agreement with PSCo (dated April 30, 1999) to provide "all the net generating capacity available at any time at the Facility" to PSCo. For the next seven years, Front Range may not sell power from the proposed Facility to anyone other than PSCo. The Facility is claimed to be a "peaking station," which will provide all the power it can generate and all that PSCo requires at times of high electricity use, in order to prevent "brown-outs" in the Denver metropolitan area. The Facility has no other function than to supply power to PSCo during such times. Under the agreement, PSCo will pay Front Range an amount sufficient to guarantee a profit, even if the facility sits idle and is never used.

In addition to this evidence of a dependent buyer-seller relationship based on a single purchaser contract, there is evidence that PSCo has the authority under the agreement to exert direct control over operations of the Facility. The power supply contract provides that PSCo's system-wide control center has "the sole right" to determine start-up, shut-down, and levels of electricity generation at the Facility. To that end, a direct connection will be established between PSCo's system-wide control center and the Facility that will allow the facility to be "remotely started and stopped" by PSCo. PSCo thus will exert decision-making authority over the day-to-day operations of the Facility. Moreover, the facility must be sited to allow PSCo to easily interconnect the facility into PSCo's power transmission system, requiring the facility to be collocated with or located near an existing PSCo facility. PSCo will supply all the fuel (natural gas) to be used at the Facility, free of charge to Front Range. Front Range will rely on PSCo to provide interconnection to PSCo's existing gas pipelines, as well as to PSCo's transmission lines. Thus, Front Range is dependent on PSCo for its fuel as well as for purchase and delivery of its product.

Given these facts, EPA believes that generation of electrical power at the Facility -- the essential function of the facility and the source of its air pollution emissions -- is under the control of PSCo. PSCo exerts control over the Facility, as that word has been applied by EPA in prior circumstances.

One could draw an analogy to a manufacturer who decides to increase production but, instead of adding additional production capability to its existing plant, contracts with another company to build a second plant next door. For example, Company A, which paints widgets, might wish to increase its output of painted widgets at times of high demand. Company A contracts with Company B to build two new painting lines on adjacent property owned by Company B. Company A will buy all of Company B's output, but Company B may only paint widgets when ordered by Company A. Furthermore, Company A supplies all the paint and all the widgets to be painted by Company B. Company A controls both input and output. To make the agreement workable, Company A pays Company B a certain amount for sitting idle in between rush orders. In essence, Company A is contracting to use Company B's paint lines, like leasing a vehicle. Alternatively, one could say that Company B's facility is an annex to the Company A plant, an adjunct facility that allows Company A to increase production at a nearby site. If there were no contract, one could say that Company B's facility is independent of Company A's, that it has the capability of painting and selling widgets to other customers. That it "stands alone." But, given the contract between the two, Company A has control over painting activities at Company B's plant and thus over its air polluting activities. In terms of air pollution control regulation, Company B's facility must be considered part of Company A's facility.

Similarly, PSCo needs to add electrical generating capacity, apparently under an order by the Colorado Public Utilities Commission (PUC). Rather than build a peaking station at the existing Fort Lupton facility, PSCo has contracted with Front Range to build and operate a peaking station several hundred yards away. PSCo will determine when power must be generated at the new facility and will purchase all the power. PSCo will determine when the new facility will

be started up, when it will be shut down, and at what levels it will generate electricity. PSCo will not only relay orders to the Facility, to bring it on line or take it down, but will have the ability to start and stop operation of the Facility at any time by throwing a switch at PSCo's own remote control center. Since PSCo has the power to determine when the Facility will operate and at what levels it will generate electricity, PSCo controls the emission of pollutants from the facility. PSCo therefore has the "power to direct or cause the direction of the management and policies" of another entity with respect to the very activities which the Clean Air Act regulates, that is, with respect to the other entity's "pollutant emitting activities."

We believe that the facts presented strongly support a finding that PSCo controls the Facility through the power supply agreement. Because PSCo exerts such control, the proposed Facility is properly considered a modification to the existing PSCo facility at Fort Lupton.

2. The existing PSCo facility and the proposed Front Range facility at Fort Lupton are under the control of persons under common control:

The ownership relationship between PSCo and Front Range provides additional evidence of common control. Front Range is a limited liability company, which is owned by two entities, FR Holdings (FRH) and Quixx Mountain Holdings (Quixx). FRH, in turn is a wholly owned subsidiary of KN Power Company, which is a wholly owned subsidiary of KN Energy, Inc. On the other side of the company, Quixx is a subsidiary of Quixx Corporation, which is a subsidiary of New Century Energies, Inc (New Century). New Century is also the parent company of PSCo, which is its wholly-owned subsidiary. Thus, the same parent company owns PSCo and one of the two owners of Front Range.

Letters from Martha Rudolph, attorney for KN, dated September 22 and 27, 1999, appear to place significant weight on the fact that FRH, an entity not related in its corporate structure to PSCo, "will possess virtually all responsibility for, and control of, the operations of the Project." First, as discussed above, EPA believes that PSCo exerts significant direct control over the Facility under the contract agreement. Second, for the reasons discussed below, we do not necessarily agree that the limited liability agreement conclusively prevents Quixx, an entity related to PSCo in its corporate structure, from having managerial and operational responsibilities at the Facility.[1]

We understand that a contractual relationship has been established between a New Century subsidiary, Quixx and FRH through the limited liability company agreement that created Front Range. We believe that the current ownership relationship of the two parties is 50 percent/50 percent, but that the agreement may be amended to create a 49 percent/51 percent relationship. Under the amended agreement, Quixx would have 49 percent voting interest,

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[1] Here, as in the case of Dupont and Dupont Dow Elastomers, EPA agrees that Front Range may not be considered a subsidiary of New Century or of one of its subsidiaries. See letter from Steven C. Riva, Region 2 Air Programs Branch Permitting Chief, to Michael L. Rodburg, Esq. (November 25, 1997).

presumably to eliminate its ability to veto decisions by FRH, the managing entity. The agreement may be amended again, to create a 49 percent/49 percent two percent relationship with a third unnamed party, giving neither major owner voting control or veto power, but reinstating equal interest between the two.[2]

According to the limited liability company agreement (dated September 17, 1999; unsigned), FRH is the "sole manager" of the Facility. It appears from this agreement that Quixx has no role in management of day-to-day operations at the facility, particularly with respect to pollution control. As we have discussed, however, the power supply agreement already gives PSCo significant authority over facility operations. Indeed, it appears that even the "sole manager" (FRH) has little ability to manage actual operations of the facility, apparently being limited to management of personnel and contracts and maintenance of the facility. Limiting Quixx's authority in this sphere may be of relatively little significance given PSCo's direct control pursuant to the contract.

Other pertinent facts we find problematic are that the limited liability agreement may be amended by agreement of the two owners, FRH and Quixx. Presumably such amendment could include lifting the limitation on Quixx's involvement in operations. Furthermore, the manager of operations, now FRH, may be removed for cause by the unanimous vote of the non-manager owners. At present, Quixx is the only non-manager owner.

The fact is that the Facility is dependent on both owners, FRH and Quixx, who have undertaken to construct and operate an emitting facility and who, singly or together, may decide to disband the company, sell the property, declare bankruptcy, or make any other decision related to the existence or nonexistence of the project. The provisions of the agreement that wall off the Quixx side of the company from any authority over contracting with PSCo may satisfy PUC requirements, but similar walling-off with respect to operations may have no effect for purposes of PSD permitting. For PSD applicability, the issue is whether these two facilities are so separate in structure and control that their emissions should not be considered those of a single source; or, whether, in fact, an appearance of separate status is contradicted by actual connection(s) so significant and so intrinsic that the two should be treated as a single source of air pollution. We believe the latter is the case.

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[2] As noted before, the determination whether two facilities should be treated as a single source is factually driven. Historically, EPA has viewed the percentage of voting interest as important, but not the sole criterion. EPA guidance published in 1979 indicates that an ownership interest as low as 10 percent may result in control, while ownership of 50 percent necessarily results in control. See 44 Fed. Reg. 3279 (January 16, 1979). Other criteria must be considered.

3. Conclusion

Even if control may not established solely through ownership, it is EPA's belief that the power supply agreement creates a contractual relationship that confers direct control on PSCo. Because both the proposed and existing facilities are under common control, have the same first 2-digit SIC code, and are adjacent, they together constitute a single stationary source. Thus, because the existing PSCo facility is a major stationary source and the new Facility will have potential emissions exceeding the PSD significance levels not only for nitrogen dioxide and carbon monoxide, but also for particulate matter, PM-10, and volatile organic compounds, it is EPA's interpretation that the Facility is a major modification for purposes of PSD applicability.

KN has urged EPA to consider this proposed facility differently than other adjacent sources with close connections through contract or ownership. Because of the regulated environment in which the Facility will operate, they urge us to use a different set of criteria for determining when one entity exerts so much control over another that two facilities may be considered a single source. It may be that the nature of utility regulation in Colorado makes our finding a foregone conclusion in this case -- or in any other where a generating facility locates near an existing power plant to which it is linked by ownership or control. That does not mean that the conclusion is an incorrect one. The purpose of the PSD program is to assure that industrial development will only be allowed in clean air areas when it is controlled in such a way as to minimize impacts of air pollution and preserve clean air resources. The criteria for source determination, developed through regulation, guidance, and many years of application, help assure that outcome. EPA believes that the result in this case is that PSD will be triggered for the Facility, unless the State issues a permit that effectively limits its potential to emit below PSD significance levels.

Sincerely,

Richard Long, Director
Air and Radiation Program

cc: Martha Rudolph, KN Energy, Inc.
Casey Shpall, Colorado Attorney General's Office
Frank Prager, Public Service Company of Colorado

NEW CENTURY ENERGIES

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Rec'd 8P - AIR
OCT 27 1999

October 26, 1999

Mr. Richard Long
U.S. Environmental Protection Agency
Region VIII
999 18th Street, Suite 500
Denver, CO 80202-2466

RE: Request for Reconsideration of October 1, 1999 PSD Applicability Determination

Dear Mr. Long:

On October 1, 1999, you sent a PSD Applicability Determination (the "Determination") to Margie Perkins, Director of the Colorado Air Pollution Control Division regarding the Front Range Energy Associates, LLC ("Front Range") facility proposed for construction near Fort Lupton, Colorado. Among other things, the Determination found that Public Service Company of Colorado ("PSCo") would control the Front Range facility through its purchase of power generated by the facility, and therefore, for purposes of the PSD program, the Front Range facility should be considered to be a single "source" with PSCo's nearby Fort Lupton generating facility.

In the attached request for reconsideration, PSCo requests that EPA reconsider the Determination both for the Front Range project and for future PSCo power purchases. As set forth in the request, the standard PSCo power purchase agreement does not render the Front Range facility or any other generating facility owned by a third party under "common control" with an adjacent PSCo facility.

The request argues that, under the Clean Air Act and EPA's PSD regulations, adjacent facilities can be considered a single source only if they fit within the common sense notion of a single "plant." In the Determination, EPA found that adjacent facilities were a single source because of the relationship between one facility (Front Range) and

the owner of the other facility (PSCo) under the power purchase agreement. This finding is inconsistent with the PSD regulations. The power purchase agreement does not create any relationship between a new, independently owned facility and any adjacent facility performing a similar function, even if PSCo owns the adjacent facility. Both facilities would independently provide power to PSCo's electric transmission and distribution system. They would not fit the common sense notion of "plant.". EPA should not find them to be a single source for PSD permitting purposes.

The request also provides EPA with a detailed discussion of the standard PSCo power purchase agreement and places it into the context of the utility industry. As that discussion demonstrates, PSCo's "control" over an independent facility is the inevitable result of the legal and technical aspects of the operation of a utility system. Contrary to the reasoning in the Determination, this "control" does not render PSCo in charge of the day-to-day operation of the facility or give it the ability to dictate the facility's environmental compliance.

As EPA is aware, unprecedented growth in eastern Colorado combined with limited transmission capability has created the urgent need for additional electric generating capacity in and near the Denver metropolitan area. EPA's Determination greatly increases the cost and difficulty of acquiring this much-needed new generation for the people of Colorado. For this reason, the attached letter respectfully requests that EPA withdraw the Determination and find that adjacent generating facilities are not considered a single source by virtue of PSCo's standard power purchase agreement.

PSCo appreciates the EPA's review of the attached request. As I indicated by telephone yesterday, PSCo requests the opportunity to meet with EPA to discuss the issues contained in it. We look forward to meeting with you and your staff soon.

Very Truly Yours,

Frank P. Prager
Attorney for Public Service Company of Colorado

Cc: Margie M. Perkins
Martha Rudolph, Esq.

Enclosures

FRANK P. PRAGER
Associate General Counsel

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October 26, 1999

Mr. Richard Long
U.S. Environmental Protection Agency
Region VIII
999 18th Street, Suite 500
Denver, CO 80202-2466

RE: October 1, 1999 PSD Applicability Determination

Dear Mr. Long:

On October 1, 1999, you sent a Prevention of Significant Deterioration ("PSD") Applicability Determination (the "Determination") to Margie Perkins, Director of the Colorado Air Pollution Control Division ("Division") regarding the Front Range Energy Associates, LLC ("Front Range") facility proposed for construction near Fort Lupton, Colorado. Among other things, the Determination found that Public Service Company of Colorado ("PSCo") would control the Front Range facility through its purchase of power generated by the facility, and therefore, for purposes of the PSD program, the Front Range facility should be considered to be a single "source" with PSCo's nearby Fort Lupton turbines. Through this letter, PSCo requests that EPA reconsider the Determination and find that the standard PSCo power purchase

agreement does not render the Front Range facility or any other generating facility owned by a third party under "common control" with an adjacent PSCo facility.

I. Background.

Colorado's need for power. This matter is before EPA as a result of the pressing power needs of the people of Colorado. Unprecedented growth in eastern Colorado, combined with limited transmission capability to the east, from the Colorado Western Slope or from other states, has created the urgent need for additional electric generating capacity to be constructed in and near the Denver metropolitan area. Under the Electric Integrated Resources Planning ("IRP") Rules of the Colorado Public Utilities Commission ("PUC"), PSCo is required to solicit new generation supplies through a competitive resource procurement process. In October 1998, PSCo issued an RFP for approximately 675 MW of new generating capacity. The Front Range facility was one of the winning offers made to PSCo from bidders in that process.

PSCo will be soliciting proposals next spring for approximately 1000 additional megawatts of generating capacity to supply power needs in eastern Colorado beginning in 2002. The Determination made for the Front Range facility will affect PSCo's next solicitation and all the bidders who respond to that solicitation. As outlined in this letter, the Determination creates practical problems for PSCo and potential bidders, due to a fundamental misunderstanding of the structure and functioning of the electric utility industry in Colorado and throughout the country.

Unless EPA reverses this determination, PSCo's ability to acquire sufficient power to meet Front Range electricity demands on a timely basis could be seriously jeopardized.

The Front Range facility. Pursuant to the IRP Rules, PSCo entered into a contract with Front Range, an Independent Power Producer ("IPP"), to purchase power from the Front Range facility. The Front Range facility is located within one mile of existing turbines owned by PSCo ("the Fort Lupton turbines"). The Fort Lupton turbines are used by PSCo during the few hours of the year when electric demand is the highest; in the electric utility industry, the Fort Lupton turbines are called "peaking" units because they generally are operated only at times of peak electric demand. Although their actual emissions are quite low due to the relatively few hours they are operated, the Fort Lupton turbines are grandfathered sources with a potential to emit that exceeds 250 tons per year of NO_x.

Like the Fort Lupton turbines, the Front Range facility was designed to operate as a "peaking" facility that would provide power to the PSCo system during periods of high electric demand. As a result, again like the Fort Lupton turbines, it was projected to have a relatively low capacity factor and emissions.

Front Range began the permitting process for its facility in late 1998. After some initial efforts to obtain a PSD permit, Front Range decided to seek a synthetic minor permit for the

facility with an emission limit of 247 tons per year NO_x. The Division issued a draft synthetic minor permit for the facility and released the draft for public comment. No comments were filed.

Prior to issuing the final Front Range permit, the Division became concerned because one of Front Range's shareholders, Quixx Mountain Holdings, LLC ("QMH"), is an affiliate of PSCo and within the corporate family of New Century Energies, Inc., PSCo's parent company. The Division was concerned that the affiliate relationship between PSCo and QMH might require the Division to treat the Fort Lupton turbines and the Front Range facility as a single source for purposes of PSD permitting. If the facilities were a single source, the Division would be required to permit the Front Range facility as a modification of the Fort Lupton turbines and would probably require PSD review. Importantly, the Division was concerned only about the effect of the PSCo/QMH affiliate relationship. It was not concerned that PSCo might exert control over the facility under the power purchase agreement. In fact, the Division did not believe that the agreement rendered PSCo in control of the Front Range facility. If not for the affiliate issue, the Division was prepared to issue the draft permit in final form.

EPA's Determination. Front Range, acting through its joint venture parents KN Energy, Inc. ("KN") and QMH, sought EPA's guidance on the effect of the PSCo/QMH affiliate relationship on the permitting requirements applicable to the facility. Front Range argued that, because of contract limitations on QMH's involvement in the management of the facility, the affiliate relationship did not render the Front Range facility and the Fort Lupton turbines a single

source. A copy of KN's letters on behalf of Front Range dated September 22 and 27, 1999, are attached as Exhibits 1 and 2.

On October 1, 1999, EPA issued its Determination regarding the Front Range and Fort Lupton facilities. In the Determination, EPA found that the Front Range facility would be under common control with the Fort Lupton turbines for two reasons. First, in an issue not initially raised by any party, it found that PSCo has control over the Front Range facility through its rights under the power purchase agreement. Second, and in the alternative, EPA found that the relationship of QMH and PSCo supported a finding that the facilities were under common control. Thus, EPA determined that the facilities were a single source. It informed the Division that, in its opinion, the draft Front Range permit was unlawful and the proposed Front Range facility would be a modification of the Fort Lupton turbines. Unless the facility would be willing to limit its NO_x emissions to less than 40 tons per year, EPA would require it to obtain a PSD permit prior to construction.

Effect of the Determination. As a result of the Determination, Front Range must do one of three things: (1) accept a synthetic minor permit for the Front Range facility that limits its NO_x emissions to 40 tons per year or less and correspondingly reduces the facility's capacity factor; (2) obtain a PSD permit for the facility; or (3) cancel the project entirely. Regardless of Front Range's choice, it now appears unlikely that the facility will be on line during the peak electricity demand season in the summer of 2000. As a consequence, PSCo is urgently seeking

additional energy supplies from existing facilities to meet its short-term needs. PSCo must also reconsider its long-term resource planning requirements to meet future electricity demand. Because of transmission constraints, in the long term PSCo cannot replace the Front Range facility by acquiring power from existing facilities. New generation must be constructed in eastern Colorado. If new generation cannot be in place on a timely basis, there will be insufficient power available to meet the electricity demands in this region. Because of its potentially serious impact on the people of Colorado, PSCo believes it is critical that EPA's Determination be consistent with the law, informed by the best available information and based on sound policy.

On November 1, PSCo will file its 1999 IRP with the PUC. Under this filing, PSCo will seek approximately 1,000 MW of additional electric capacity to meet the growing energy demand in the Denver metropolitan area in the early part of the next decade. PSCo will solicit bids from IPPs and other utilities to provide power under PSCo's standard power purchase agreement ("PPA"). Exhibit 3. The PPA is virtually identical to the Front Range power purchase agreement reviewed by EPA in making the Determination. PSCo expects that the winning bidders in this next IRP solicitation may build new generating facilities near other power plants, perhaps power plants owned by PSCo.

Request for reconsideration of the Determination. Under Colorado law, PSCo is required to arrange for sufficient electric capacity, either through its own generation or through generation

owned by others and under contract to PSCo, to serve its customers' electric demands. It is PSCo's unavoidable role as purchaser from other generating facilities that serves as the basis for EPA's Determination. As a result, PSCo is the primary party affected by the Determination and its implications.

PSCo disagrees with EPA's finding in the Determination that the involvement of its affiliate in Front Range renders the Front Range facility under PSCo's control. However, in this letter, PSCo does not seek reconsideration of that part of the Determination. PSCo is more concerned about the first part of the Determination, which found that PSCo controls a generation project solely by virtue of the standard electric utility industry provisions contained in the PPA. This part of the Determination affects more than just the Front Range project. It could affect almost every other power purchase arrangement entered into by PSCo or any other utility operating in the United States.

Therefore, for the reasons set forth below, PSCo respectfully requests that EPA reconsider the first part of its Determination for both the Front Range and future power projects. PSCo asks that EPA find that the PPA does not give PSCo control over an IPP project built and operated to meet its requirements.

II. The Clean Air Act requires that two facilities must fall into the common sense definition of a "plant" to be considered a single source.

In the Determination, EPA for the first time found two facilities to be a single source based only on the relationship between one facility and the company that owns the adjacent facility. EPA did not find that there was a support relationship between the Fort Lupton turbines and the proposed Front Range facility. Instead, it based the Determination entirely on the control that PSCo supposedly would assert over the Front Range facility through the PPA. In doing so, EPA improperly considered factors beyond its statutory authority. As discussed below, the Clean Air Act requires EPA to find that adjacent sources are separate unless, because of the relationship between them, they fit the common-sense concept of a single plant.

Section 165 of the Clean Air Act states that the PSD program applies only to "major emitting facilities." 42 U.S.C. § 7475(a). "Major emitting facilities" are certain stationary "sources" that have a potential to emit any pollutant at a rate of 100 tons per year or more or "any other source" that emits any pollutant at a rate of 250 tons per year or more. 40 U.S.C. § 7479(1). In Alabama Power Company, et al. v. Costle, 636 F.2d 323 (D.C. Cir. 1979), the Court of Appeals for the District of Columbia Circuit considered, among other things, the definition of the term "source" in EPA's original PSD regulations. It found that the term was governed by the definition of "source" under the New Source Performance Standards ("NSPS") found in § 111 of the Act. Alabama Power, 636 F.2d at 394. Section 111(a)(3) defines

"stationary source" to mean "any building, structure, facility or installation which emits or may emit any air pollutant." 42 U.S.C. § 7411(a)(3). The Alabama Power court found that the four terms used in the Section 111 definition of "source" (i.e., "building, structure, facility or installation") "encompass all of the types of entities specified in the first sentence of Section 169(1), as well as all entities and activities included in the longer list compiled by EPA from which the statutory list was drawn. . . . EPA has discretion to define the terms reasonably to carry out the intent of the act, but not to go clear beyond the scope of the Act . . ." Alabama Power, 636 F.2d at 396 (emphasis added).

On remand from the D.C. Circuit, EPA created the familiar three-part definition of the terms "building, structure, facility, or installation": "*Building, structure, facility, or installation* means all of the pollutant emitting activities which belong to the same industrial grouping, or located in one or more contiguous or adjacent properties, and are under control of the same person (or persons under common control)." 40 C.F.R. § 51.166(b). In doing so, the EPA responded to the Alabama Power court's order that it limit the definition to those facilities that fit within the statutory definition of a "source":

> In EPA's view, the ... opinion of the court in Alabama Power sets the following boundaries for PSD purposes of the component terms of "source": (1) it must carry out reasonably the purposes of PSD; (2) it must approximate a common sense notion of "plant"; and (3) it must avoid aggregating pollutant emitting

activities that as a group would not fit within the ordinary meaning of "building," "structure," "facility," or "installation."

45 Fed.Reg. 52,676, 52,694-5 (August 7, 1980). Because of the statute and Alabama Power, EPA recognized that its definition must "approximate the common sense notion of 'plant'" and must not "group activities that would ordinarily be regarded as separate...." Id. at 52,694.

Traditionally, EPA has viewed the "common sense notion of 'plant'" as requiring it to look closely into the relationship between two adjacent sources. Thus, in virtually every other pertinent PSD determination, EPA has found that two facilities owned by separate entities were a single source only if one facility served the interests of the other in some way, e.g. as a support facility. For example, EPA Region VII set forth a broad list of factors that agency should consider in making a source determination. Those factors turn on whether the facilities share common work forces, equipment, responsibilities for pollution control and other intimate relationships for the operation of both facilities. They also focus on contractual relationships between the facilities for support. Thus, Region VII asks a very important question, one that EPA should consider in this case: if one facility shuts down, is the other under any limitation to pursue outside business interests? If it were under no such limitation, Region VII would find the sources to be separate. September 18, 1995 letter from USEPA Region VII to Iowa DNR. See

also undated letter from USEPA Region III to Pennsylvania DEP regarding USN and NE Hub facilities ("Henry Letter")("If facilities can provide information showing that a new facility has no ties to an existing facility, or vice versa, then the new facility is most likely a separate source under its own control."); February 20, 1998 letter from USEPA Region IV to South Carolina DHEC (facilities are under common control if one is dependent on the other).

Similarly, in an August 2, 1996 letter from OAQPS to the Regions regarding military installations, EPA stated that a contract for services between the owners of adjacent facilities can support a determination of common control if the services provided by one facility are integral to or support the operation of the adjacent facility. In other words, EPA is justified in making a single source determination only if, in a common sense way, EPA can justify treating the facilities as a single plant.

Here, the Determination is based on the contractual relationship described in the PPA. The PPA does not create any relationship between a new IPP facility and any adjacent facility performing a similar function, even if PSCo owns the adjacent facility. For example, the PPA for the Front Range facility does not require the Fort Lupton turbines to provide anything – raw materials, employees, or services – to Front Range. The PPA does not require Front Range to provide its finished product, electricity, to the

Fort Lupton turbines.[1] Both facilities operate to meet system demands, not to meet the requirements of each other. In fact, either facility could shut down and have no impact on the operation of the other. Therefore, EPA should not consider them a single plant or find them to be a single source.[2]

In the 1980 preamble, EPA rejected any notion that sources separated by a great distance would be considered under common control even if connected by and operated under the same transmission system. 45 Fed. Reg. at 52695. The transmission system is the electric equivalent of a highway. It is the only thing that connects an existing PSCo plant to a new IPP facility that sells power to PSCo under the PPA. The owners of the two facilities would not operate them any differently regardless of whether they are located across the road or across the state from one another. By EPA's own reasoning in the 1980 preamble, a new IPP facility and an existing PSCo plant cannot fit within the common sense definition of "plant."

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[1] The Front Range PPA includes a provision that allows the Front Range facility to provide water to the Fort Lupton turbines. However, this provision is included as a convenience to both parties. The Fort Lupton turbines would not be dependent on the Front Range facility for water. As Exhibit 3 demonstrates, the standard PSCo PPA does not include any provision like this.

[2] In the Determination, EPA attempts to analogize the Front Range facility to a mythical "widget painting factory" adding a new production line. The problem with this analogy is that it is a myth. A real factory would probably locate adjacent to an existing facility because it has some relationship to the operation of the existing facility. Under the standards of EPA's regulations and Alabama Power , EPA might be justified in those circumstances in finding that the plants are a single source because of the relationship between the facilities. In this case, however, there is no relationship between any existing PSCo facility and a nearby, new power plant. The new power plant would be independent of the existing power plant and, as discussed in more detail below, would have a relationship with PSCo only because it is an integrated, regulated utility.

Such a finding is consistent with the purposes of the PSD program. When it created the PSD program, Congress sought to establish a preconstruction review program that would apply to new and modified major sources. It could have applied the program to any source, but chose to limit the program to those sources that (depending on the type) emit more than 100 or 250 tons of any pollutant. As interpreted by EPA, Congress also authorized potentially major sources to avoid PSD by agreeing to a synthetic minor permit limit. Congress gave EPA the authority to define separately operated adjacent facilities as a single "source" to prevent them from circumventing PSD by breaking a single plant into many smaller parts. However, Congress did not intend for EPA to group unrelated sources together in order to expand the well-defined limits it placed in the PSD program. In this light, if it is to be consistent with the PSD program, EPA must view facilities that sell power to PSCo under the PPA as separate sources.[3]

III. The PPA does not give PSCo control over an independent power facility.

In the Determination, EPA found that the Front Range facility and the adjacent Fort Lupton turbines would be a single source because, EPA believed, they would be under PSCo's common control. In making this finding, EPA relied on four facts: (1) Front Range would have sold all the power from the facility to PSCo; (2) PSCo would

[3] As discussed below, these new generating units are peaking utilities that are not anticipated to run at high capacity factors. Most are very low-emitting, gas-fired turbines. Thus, their emissions are unlikely to have any significant air quality impacts even if they do not go through the PSD process.

have had the right to order the facility to operate, i.e., to "dispatch" the plant; (3) PSCo would have purchased the fuel for the facility; and (4) PSCo would have exerted control over the facility because of its interconnection to PSCo's transmissions lines. EPA reached its conclusion with at most a cursory review of the details of the utility industry into which the Front Range and other IPP facilities must sell power. In fact, EPA improperly rejected the need for a detailed review of the industry as irrelevant to its findings. If EPA undertakes a more detailed examination of the utility industry, it will find explanations for the factors that led it to conclude that the facilities were under common control. These explanations confirm that the PPA does not render a new power facility and a nearby PSCo facility a single source.

As discussed above, EPA designed the three part definition of "building, structure, facility, or installation" to help it determine whether adjacent sources fit the common sense definition of a "plant." In making this determination, EPA relies on the SEC definition of control: "Control is the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person (or organization or association) whether through the ownership of voting shares, contract or otherwise." 17 C.F.R. § 240.12b-2. EPA has recognized that it should not apply this definition recklessly. It must carefully consider the details of a business relationship to determine "the power of one business entity to affect the construction decisions or pollution control

decisions of another entity." 45 Fed. Reg. at 59,878. Under this standard, PSCo does not control an IPP facility selling its power pursuant to the PPA.

PSCo's purchase of power under the PPA. Under the PPA, PSCo purchases two energy products from an IPP building a new facility. First, it purchases the "Contract Capacity." The Contract Capacity is all of the net generating capacity of the plant. The Contract Capacity requirement allows PSCo to reserve the plant's ability to generate power for PSCo's use in meeting Denver's energy demand. Second, PSCo buys all of the facility's "Contract Energy." Contract Energy is the net electrical energy actually generated by the facility and sold to PSCo for use by its customers.

These contract provisions are the logical outgrowth of PSCo's role as the sole provider of retail electricity in its service territory. Under Colorado law, PSCo is a regulated monopoly serving the Denver metropolitan area and the majority of the people of Colorado.[4] No other entity is entitled to sell electricity to retail customers in the Denver metropolitan area. PSCo provides the electric service subject to the oversight of the PUC. The PUC mandates the process through which PSCo purchases power. PSCo

[4] The wholesale power market is a competitive market, regulated by the Federal Energy Regulatory Commission under the Federal Power Act. Wholesale suppliers, such as traditional electric utilities, IPPs and power marketers, compete against one another to sell power to electric utilities, who in turn sell power to retail customers. Many states are restructuring their electric utility regulations to permit direct access by competitive suppliers to retail customers. In Colorado, no direct retail access is permitted at this time. Colorado utilities (like PSCo) serve all retail customers.

must act in the public interest and must fulfill its obligation under Colorado law to serve its customers. If customers need power, PSCo must provide it through a competitive bidding process. PSCo retains the ultimate obligation to serve its customers and is accountable to the PUC and the public for its performance. It must develop contract terms that address these obligations. Consequently, in the PPA, PSCo obtains: (1) Contract Capacity to meet planning and reliability requirements; and (2) Contract Energy to meet actual, moment to moment customer demand. These provisions are the electrical equivalent of a requirements contract. They are not sufficient to support a finding that PSCo controls an IPP facility through the PPA.

Moreover, under the PPA, PSCo has contracted to receive power from the facility for a relatively small proportion of the facility's operating life. In the Front Range contract, PSCo had the right to receive power from the Front Range facility only for seven years of the facility's thirty-year life.[5] After the initial term, Front Range is free to contract to sell the power to any purchaser. (IPPs are often willing to enter into the PPA precisely because they expect to be able to sell to parties other than PSCo in an unregulated energy market after the PPA expires.)

[5] The Front Range PPA also requires PSCo's energy marketing affiliate, e prime, to take power from the facility for resale in the wholesale and, perhaps, retail energy markets. This provision is not typical of PSCo's PPAs. Even with this provision, PSCo or its e prime affiliate would be required to take the power for only one half of the facility's expected life.

Even during the contract term, PSCo does not have the "power to direct or cause the direction of the management and policies" of the IPP. PSCo cannot control any of the following important aspects of the operation of the facility:

- Constructing the facility;
- Determining the number of employees necessary to run the plant;
- Hiring the employees;
- Providing payroll, benefits and other administrative functions related to the facility employees;
- Training the employees;
- Scheduling and performing facility maintenance;
- Responding to facility emergencies;
- Protecting employee health and safety;
- Establishing site security;
- Making decisions regarding bankruptcy, dissolution, and continued facility operation;
- Establishing long term business plans;
- Managing equipment inventories;
- Reporting and recordkeeping;
- Testing equipment;

- Monitoring and controlling chemistry;
- Analyzing and correcting malfunctions and accidents;
- And, most importantly, maintaining environmental compliance.

See Henry Letter; September 18, 1995 Region VII letter.

Finally, as discussed in detail above, the energy and capacity purchased under the PPA is unrelated to the operations of any adjacent facility. The two facilities would not be operated as a single plant and should not be considered a single source.

Dispatch of the Facility. In the Determination, EPA stated that "PSCo's system-wide control center has 'the sole right' to determine start-up, shut-down, and levels of electricity generated at the Front Range facility." EPA noted that PSCo will have the ability to remotely start and stop the facility through an electronic connection known as Automatic Generation Control ("AGC"). For this reason, EPA believes that PSCo would "exert decision-making authority over the day-to-day operations" of the facility. Presumably, EPA's interpretation of PSCo's remote start capability would apply to any facility adjacent to a PSCo facility and generating power under the PPA.

EPA's interpretation of these facts grossly oversimplifies utility operations and the physics that dictate the operation of an electric system. First, electricity is not like

other manufactured products. It cannot be stacked on the shelf or put in inventory for later use. Electricity is required in real time to meet load. When someone turns on a light, a power source connected by wire to the light must provide power to meet the light's electric demand. As more lights, motors, computers and other equipment on the system demand electricity (i.e., as load increases), more generators on the system must come on line at the same time to meet this load. This real-time energy requirement explains PSCo's need for more generating resources: it must meet increased load during times of peak energy demand.

As an integrated public utility, PSCo not only generates, purchases and delivers electricity, it also charged with the real time operation of its electric system. Within the North American Electric Reliability Council and its western counterpart, the Western System Coordinating Council, PSCo acts as a control area operator. As a control area operator, PSCo orders the operation of the generation and transmission resources within the control area to provide reliable, stable, and efficient electric service. It must ensure that there are adequate reserves to meet demand in the event of resource failures within the system. It must ensure that schedules with neighboring control areas are maintained so that problems in one control area do not cause the whole electric system to fail. It must ensure that resources start when load increases and, just as importantly, stop when load decreases; energy generated from the wrong plant at the wrong time can have a catastrophic impact on the transmission system. Thus, as a control area operator, PSCo

must have the sole right to dispatch all generating units (whether owned by PSCo or others) in its control area to ensure the most efficient, reliable use of its resources.[6]

As discussed above, in the near future, PSCo will be soliciting new generation resources that will supply power when power demand in the Denver area is high. Like all generating facilities in PSCo's control area, these new resources can fulfill this requirement only if they receive and operate in response to real-time load information. Whether by AGC or by telephone, IPP generators and other utility generators must receive a signal from PSCo to ramp their facilities up and down so that all facilities are operationally coordinated. Without this coordination, PSCo will be unable to ensure reliable electricity production and delivery to meet the energy demands of the people of Colorado.

The Determination relies on PSCo's role as a control area operator to find that PSCo controls the day-to-day operations of individual IPP facilities. In fact, PSCo controls only the thing that it must to run an electric system: starting, stopping and loading the unit. These decisions, however, are exercised independently for two adjacent facilities; they are not operated as a single plant resource. For example, under paragraph

[6] Control is an important issue for transmission reliability. The major western electric outage in 1996 highlighted transmission reliability as an issue for this region. As a result of an increased focus on reliability, PSCo and its neighboring utilities formed the Rocky Mountain Reserve Group (the "RMRG"), which sets various requirements with respect to dispatch response. To meet this RMRG requirements, it is essential that PSCo "control" as many generating facilities in its control area as possible using AGC.

7.1(B) of the Front Range PPA, PSCo cannot order the the Front Range facility to operate "in excess of the Facility's permitting levels or in an manner that otherwise would violate Seller's permits, approvals, authorizations or consents from governmental authorities." PSCo willingly includes provisions like this in any contract where dispatch of the facility could affect the facility's compliance with permit requirements. On the crucial issue of compliance with environmental requirements, PSCo has no authority over the IPP facility. See August 2, 1996 OAQPS letter (in common control decisions, EPA considers power to implement major emission control measures or compliance with environmental regulations).

As EPA may be aware, the American electricity industry is restructuring. In a restructured industry, generating plants would be free to compete with one another for direct sales to retail customers. However, the plants must send their power to customers over wires, a function likely to remain regulated. As part of the restructuring of their electric markets, many states require their existing utilities to transfer their role as a operator of their transmission system to a third party, known as an independent system operator ("ISO"). The ISO would perform the same function that companies like PSCo perform today. It would dispatch the power generated by utilities, IPPs and other generating facilities that it does not own. Under its reasoning in the Determination, EPA may find that adjacent generating facilities , even if owned by competitors, may be under the ISO's common control and therefore a single source for permitting purposes. Such a

finding would make no sense. It is inconsistent with the common-sense definition of a plant and, like the Determination itself, unsupported by the regulations.

Gas Tolling Agreement. Under the PPA, PSCo would purchase the natural gas to be used as fuel by the generating company supplying power to PSCo's system. This type of PPA is known as a "tolling agreement." Tolling agreements are becoming more common in the utility industry. They may reduce the ultimate price of the electricity to the retail customers because in many cases the utility has greater purchasing leverage for natural gas than possessed by the IPP. Standard industry contracts that are not tolling agreements generally provide for a dollar-for-dollar pass through of the fuel expense from the generating company to the purchasing utility. Consequently, since the retail customers ultimately bear the expense of the fuel, it makes sense to structure the contract in a manner that assigns the fuel procurement to the entity that can buy the fuel at the lower cost.

Contrary to EPA's assertion in the Determination, the PPA does not require PSCo to provide natural gas to an IPP generator "free of charge." Under the PPA, PSCo provides the IPP with gas and the IPP sells PSCo power at a price that accounts for the value of the gas provided. To meet the obligations of the PPA, PSCo must perform two distinct functions: First, it must acquire natural gas for the facility. PSCo does so under a variety of gas purchase contracts that provide for gas to be delivered to PSCo's natural

gas pipeline system (or an upstream system that transports the gas to PSCo). PSCo uses these gas purchase contracts to supply its own gas-fired generating plants as well as other IPP plants operating under their own tolling agreements. It does not enter into a separate contract for each facility or each cluster of facilities. Second, upon receipt of the gas delivered under these contracts, PSCo transports the gas to the facility. PSCo bases its gas transportation arrangements on the same economic factors, costs and procedures regardless of whether the gas is delivered to PSCo's own plants, an IPP facility, or any similarly situated customer.[7]

In the Determination, EPA finds that this type of gas tolling arrangement is evidence of PSCo's control of the Front Range facility. EPA's finding is at odds with its own determinations. In the past, EPA has viewed common fuel purchases as indications of common control of adjacent facilities because they demonstrate that the facilities are operated as a single plant. See September 18, 1995 Region VII letter. In fact, under the tolling agreement, an IPP facility would acquire its gas supplies in the same way as the rest of PSCo's electric generating system. The gas tolling agreement does not tie the gas purchases for the IPP facility to an adjacent PSCo facility. If one or the other adjacent

[7] In some circumstances, PSCo may also take steps to connect to a facility to its natural gas system. For the Front Range project, PSCo would have connected the facility to its pipeline and would be financially responsible for any reductions in the plant's operating capabilities resulting from low gas pressure. This unusual requirement is consistent with PSCo's obligation to provide gas under the PPA; it does not provide PSCo with any additional control over the facility.

facility ceased to operate, PSCo would still purchase gas for the remaining facility in the same way.

For example, PSCo would not enter into a single, separate fuel contract to serve the combined operations of the Fort Lupton and the Front Range facilities. Instead, it would enter into fuel contracts for gas for its whole electric generating system. The gas would be used as fuel in Fort Lupton, Front Range and numerous other generating plants, some located far from the Front Range plant site. PSCo would not acquire gas for the Front Range facility (or any IPP facility operating under the tolling agreement) as though the facility is a single "plant" combined with an adjacent PSCo generation unit. Thus, the gas tolling agreement provides no support for a finding that an IPP facility is a single source with an adjacent PSCo facility.

Transmission Interconnection and Protection. In the Determination, EPA cites as evidence of common control the fact that "the Facility must be sited to allow PSCo to easily interconnect the facility into PSCo's transmission system, requiring the facility to be collocated with or near an existing PSCo facility." Few would be surprised by the fact that electricity travels by wire and wires have a limit to how much electricity they can carry. In order for PSCo to provide power to the people of Colorado without the delay and cost of building new transmission lines, PSCo should locate new generating facilities in places where power can safely and efficiently enter the PSCo system. Usually, these

places are near existing PSCo or IPP generating facilities. The location of the new IPP facilities, however, is an issue related to adjacency, not to control. In the utility industry, some adjacency may be inevitable, but adjacency by itself does not trigger a finding of common control or a single source. In fact, if the facilities were sited further apart, their location would not "affect the degree to which they may be dependent on each other." Henry Letter at 2. They are and would remain independent.

In the PPA, PSCo has included measures to protect its transmission system from damage from non-PSCo generators and ensure that the generators will provide power reliably. These measures include: (1) an operating committee to coordinate facility operation and maintenance schedules with the PSCo load requirements; (2) IPP maintenance notification and coordination incentives to ensure that the facility is available when needed; and (3) system protection and interconnection guidelines to protect the future integrity of the transmission system. These measures do not give PSCo control over the IPP facility. They are designed only to promote IPP reliability and protect the PSCo transmission system and the electric grid. As discussed above, the IPP is solely responsible for other aspects of its day-to-day operation of the facility.

IV. Conclusion.

The Determination is a significant departure from EPA's prior PSD determinations. For the first time, it finds that adjacent facilities owned by separate entities are a single source despite the fact that the facilities have no direct relationship. For this finding, the Determination relies entirely on the relationship between an IPP facility and a large utility system. The Determination makes this finding while dismissing the economic and technical realities of the industry to which it applies. By doing so, the Determination ignores the mandates of the Clean Air Act and the purpose of the PSD program. It places utilities all over the country at risk of enforcement for permit violations by IPPs beyond the utilities' control. It also raises the cost and increases the difficulty of acquiring new, much needed generation. It does so for the sake of little air quality benefit.

For the foregoing reasons, PSCo respectfully requests that the EPA withdraw its October 1, 1999 Determination and, consistent with the mandates of the Clean Air Act, find that the PPA does not mandate a finding that two adjacent power plants are a single source. PSCo also requests the opportunity to meet with you and your staff to discuss the issues raised in this letter and to clarify any questions or concerns related to it.

Very truly yours,

Frank P. Prager
Associate General Counsel
New Century Energies, Inc.

Cc: Margie M. Perkins
Martha Rudolph, Esq.

Enclosures

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Sept. 21 1999

Richard Long
U.S. Environmental Protection Agency
Region VIII
999-18th Street, Suite 500
Denver, Colorado 80202-2466

Re: Pending Permit Application of Front Range Energy Associates, LLC with the Colorado Air Pollution Control Division

Dear Mr. Long:

The purpose of this letter is to provide information concerning the issue of whether the proposed power generating facility at Fort Lupton owned by Front Range Energy Associates, LLC, ("**Front Range**"), should be considered a separate source from a back-up generating facility at Ft. Lupton owned by Public Service Company of Colorado ("**PSCo**"), for air permitting purposes. If the Front Range Fort Lupton facility is a separate source not under common control with PSCo, it could obtain a synthetic minor source permit under the PSD requirements and the completion of the permitting process could be expedited. To help ensure the availability of sufficient power beginning in 2000, Front Range is obligated to complete the Fort Lupton facility on or before May 7, 2000. Financing of the facility will be achieved through project specific non-recourse debt financing. Financing must close by September 30, 1999 in order to ensure that the facility can be funded, and that the May 7, 2000 deadline can be met. Financing cannot close, and construction cannot commence, however, until receipt of the construction air permit.

Front Range submits that the following information supports the conclusion that the Front Range facility is a separate source from the PSCo generators, and that a synthetic minor construction permit can therefore issue.

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I. Ownership and Management Structure of Front Range Energy Associates, LLC

Front Range is a Delaware limited liability company created pursuant to Deleware law. Front Range was formed upon the filing of a Certificate of Formation with the Delaware Secretary of State, and as required, has been qualified to conduct business in Colorado. Under Delaware law, a limited liability company is a distinct entity, separate and apart from its constituent owners. Front Range is owned by its two members, Quixx Mountain Holdings, LLC ("QMH"), and FR Holdings LLC ("FRH"), in the following percentages: QMH - 49% and FRH - 51%. QMH and FRH selected the limited liability company entity as the entity of choice for specific reasons. First, a limited liability company, as a statutorily-created separate stand-alone entity, affords its members limited liability, in the same manner that a corporation affords its shareholders limited liability. Second, the limited liability company also allows the separation of management and control from economic ownership through its governing document, the limited liability company agreement. Thus, a limited liability company can be governed by its members or by a manager. The Front Range Limited Liability Company Agreement establishes that FRH will exercise management control over Front Range as its manager.

As Manager, FRH will possess virtually all responsibility for, and control of, the operations of the Project. FRH will act as the company's representative with respect to the third-party operator's ("General Electric Company") operational and administrative activities under the Power Supply Agreements, and will monitor the performance of General Electric Company's operation and maintenance services. In addition, FRH will be vested with the sole authority to make decisions concerning emissions and pollution control (including sole budgeting and expenditure authority related thereto), during both the construction and operational phases of the Project. FRH posses the sole right to negotiate with PSCo and e prime, and the sole right to make all decisions on behalf of Front Range with respect to the PSCo and e prime PPAs.

Because QMH possesses a minority interest in Front Range, QMH cannot veto or dictate decisions made by FRH with respect to the management and operations of the Company, including but not limited to the establishment of budgets. In summary, because FRH is Manager vested with control over the Company, and because QMH possesses a minority interest in Front Range, FRH possesses sole management control over Front Range.

II. The Project

Front Range was formed for the sole purpose of developing, financing, operating and owning an approximately 164 megawatt single-cycle generating facility, consisting of four GE LM6000 combustion turbine generators, in Fort Lupton, Colorado (the "Project").

The Project is being developed in response to PSCo's request for proposals issued on October 20, 1998, pursuant to a mandate by the Colorado Public Utility Commission. Because of a short-fall in generation, PSCo experienced blackouts in the summer of 1998. The Colorado Public Utility Commission ("PUC"), in reaction to these blackouts, mandated that PSCo pursue requests for proposals for additional generation. The PUC ordered that the new generating capacity be built by the summer of 2000, and indicated that the new generation should be at sites that would "mitigate the transmission and ancillary costs related to connection to the Company's system" and have "availability of natural gas transportation capacity." (PUC Order dated October 2, 1998, Decision No. C98-1042 at 8.) Front Range considered those criteria in responding to the requests for proposal and proposed the Project be located at the Ft. Lupton site because of ownership of the property by an affiliate of FRH, the quick access to the PSCo property and transmission lines, and the location of numerous natural gas pipelines beneath the property.

Throughout the RFP and contracting process, the PUC mandated that stringent requirements of independence be observed to prevent any preferential treatment of FRH because of the "affiliate" relationship between QMH and PSCo under the definitions contained in the federal Public Utilities Holding Company Act.[1] An independent evaluator was used to review and to select the winning bid. Front Range was selected as one of several providers of additional generation by the independent evaluator based upon a competitive, all resource solicitation.

FRH conducted all negotiations with PSCo on behalf of Front Range, in order to eliminate any potential concerns regarding the fairness of the process. Throughout these negotiations an independent evaluator was present at all meetings between FRH and PSCo to assist in the negotiations and to make sure Front Range did not obtain any advantage. To ensure against non-PUC authorized communications or other dealings,

[1] QMH is a wholly-owned subsidiary of Quixx Corporation, a Texas corporation. Quixx Corporation is a wholly-owned subsidiary of NC Enterprises, Inc., and NC Enterprises, Inc. is a wholly-owned subsidiary of New Century Energies, Inc. PSCo is also a subsidiary of New Century Energies, Inc. See chart reflecting New Century Energies, Inc. affiliates (Attachment A).

PSCo and QMH were subject to an internal company separation policy. In addition, all permitting activities of Front Range, including specifically air permitting activities, have been conducted by FRH or KN Power Company, and not by QMH.[2] . The land on which the Project will be built will be acquired by Front Range from a FRH affiliate. As mentioned, the Ft. Lupton site was chosen because it met the PUC criteria of close proximity to existing PSCo supply distribution systems.

In June, 1999, the PUC approved the Power Supply Agreement for the Sale of Electricity Capacity and Energy between PSCo and Front Range. (PUC Order dated June 3, 1999, Decision No. C99-568.) In its order, the PUC acknowledged that the negotiations between Front Range and PSCo had been fair and without preference for any bidder. The PUC found the Front Range Project to be in the "public interest" and that Front Range had received no unfair competitive advantage in the bid process. Id. at 9-11. Specifically, the PUC noted the benefit to consumers because the Front Range Project "is part of the least cost portfolio of generation that was made available to Public Service as a result of the competitive bid process," that "this least cost portfolio has better reliability than the other portfolios closest in total cost," and that the least cost portfolio "contributes lower average emissions in tons/MWH than [Public Service's] existing system." Id. at 8.

The PUC approved the Purchase Price Agreement after reviewing and accepting the report of the independent evaluator. The process ordered by the PUC to maintain separation between Front Range and PSCo to avoid influence and preferential treatment not only established a process by which PSCo and Front Range must deal with each other, but a mind-set of complete independence and autonomy that continues today.

III. Power Purchase Agreements

All of the Project's electrical capacity and energy during the period May 1, 2000 through April 30, 2007, will be sold to PSCo pursuant to a Power Supply Agreement (the "**PSCo PPA**"). The PUC required PSCo to enter into supply agreements requiring new generation facilities to be located near existing PSCo facilities for access to existing distribution systems. The PPA contains provisions that are standard in the industry. Under the PSCo PPA, PSCo must pay Front Range a contracted for amount whether power is discharged or not. These "capacity payments" payable to Front Range are

[1] FRH is a wholly-owned subsidiary of KN Power Company, which is in turn a wholly-owned subsidiary of KN Energy, Inc. No common ownership or control exists between the New Century Energies, Inc. related entities and the KN Energy, Inc. related entities

determined by a net capability, established at 164 megawatts, which is then modified to reflect a 12-month capacity availability factor taking into account planned and unplanned derated hours. Front Range will also receive fixed operation and maintenance payments, and payments for actual energy production. Because of the payment mechanisms, the Project will be economically viable, whether or not PSCo actually takes energy from the Project. PSCo will supply fuel to the facility, directly from its own sources and/or through third parties. It is presently anticipated that fuel will be supplied both by PSCo and through third-party suppliers. Alternative fuel supplies are readily available at the site, should PSCo fail to provide fuel.

For the period May 1, 2007 through April 30, 2015, all of the Project's electrical capacity and energy will be sold to e prime, inc. ("e prime"), pursuant to a Power Purchase Agreement (the "e prime PPA"). KN Energy, Inc., or its designated affiliate, has an option to acquire 50% of the capacity and energy from the Project under identical terms and conditions to those of the e prime PPA. This option must be exercised no later than April 30, 2002. e prime is a power marketing firm and it will independently market the power it acquires from the Project. PSCo may or may not acquire power pursuant to the e prime PPA, and presently is under no obligation and has no right to do so. e prime is a wholly-owned subsidiary of NC Enterprises, Inc. e prime owns no generation assets, and is engaged primarily in energy related products and services that include, but are not necessarily limited to, electric and gas brokering, marketing and trading, and energy consulting.

The PSCo and e prime PPAs cover only the first 15 years of the Project, which has an expected life of at least 30 years. For the remaining years following the PSCo and/or e prime PPAs, it is expected that Front Range will market electricity to wholesale customers.

Front Range's lenders have employed an independent consulting firm to conduct a market analysis of the Project, assuming that the PSCo PPA and the e prime PPA did not exist. The analysis shows that, because of present market conditions in the electric industry, the Project is economically viable as a merchant plant, without the PSCo PPA or the e prime PPA. Thus, the Project is not economically dependent upon PSCo or e prime.

Both the PSCo PPA and the e prime PPA require Front Range to operate the Project in compliance with all applicable laws and, in particular, laws relating to the environment. Specifically, both agreements prohibit dispatch of the Project in a manner that would cause the Project to exceed NOX and other emissions limitations, as determined pursuant to the air permit. The operating agreement to be entered into with

General Electric Company, the third-party operator of the Project, also contains such protective provisions.

These PPA's contain terms and conditions common to the industry, although somewhat unique to this industry because of the nature of this regulated market. Front Range elected to pursue this Project because of the benefits of the current PPA with PSCo, but also to be well positioned to compete in the marketplace once deregulation occurs.

IV. Discussion of Applicable Guidance and Regulations

Under EPA's regulations, one of the criteria for determining whether two facilities should be treated as a single source is whether they are "under common control of the same person (or persons under common control)."[3] EPA regulations do not define "common control." However, a series of EPA memoranda, letters and other guidance documents issued during the past 20 years have shed light on the factors that might be considered in determining whether two facilities are under "common control." In September 1980, EPA determined that "common control" issues would be made on a "case-by-case" basis. Specifically, EPA stated:

> Control can be a difficult factual determination, involving the power of one business entity to affect the construction decisions or pollution control decisions of another business entity. EPA thought that a simplifying test of control, such as some specified voting share, would serve the interest of the business community, by providing clarity and predictability. Comments on this issue were solicited and suggestions were received. Upon receiving the comments, the Agency did not find a convincing argument in favor of any particular, simplified test of control. . . . Therefore, the Agency has decided that determinations of control will be made case-by-case, without benefit of a voting share test or other simplifying test. However, the Agency will be guided by the general definition of control used by the Securities and Exchange Commission. In SEC considerations of control, control "means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person (or organization or

[3] A "major source" means: "any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person (or persons under common control)) belonging to a single major industrial grouping and that are described in paragraph (1), (2) or (3) of this definition." 40 CFR 70.2; 40 CFR 71.2 (1998). Similarly, under EPA's new source review regulations, a "building, structure, facility, or installation" means: "all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel." 40 CFR 51.166 (1998).

association) whether through the ownership of voting shares, contract, or otherwise." 17 CFR 210.1-02(g).

45 Fed. Reg. 59874, 59878 (September 11, 1980)).

A number of EPA guidance documents have determined that a person with as little as a 50% voting interest can control an entity. [See Letter dated November 2, 1998 from Steven C. Riva to Janet Griffin, Schering-Plough Corporation; Letter dated November 2, 1995 from Jewell A. Harper, EPA Region IV, to Terry C. Harris, Knox County Department of Air Pollution Control; Letter dated July 20, 1995 from Jewell A. Harper, EPA Region IV, to Ron Methier, Georgia Department of Natural Resources. Memorandum dated March 16, 1979 from Edward E. Reich, Division of Stationary Source Enforcement, to Diane Dutton, EPA Region VI). See also Letter dated March 3, 1990 from Douglas M. Skie, EPA Region VII [sic] (should be Region VIII), to Jeffrey T. Chaffee, Montana Department of Health and Environmental Sciences.] The stated rationale is that even though a person with a 50% voting interest could not mandate a decision by the entity, it could have the power to veto a decision regarding the implementation of major emission control measures. Here the issue of control is relevant to the relationship of PSCo to Front Range, or the relationship of QMH to Front Range. Because QMH has only a 49% ownership interest in Front Range, it cannot veto any management decisions by the Manager, and co-member, FRH. Consequently, it cannot be found to "control" by virtue of its ownership interest. Similarly, PSCo owns no interest in Front Range.

EPA has also recognized that a person with no economic ownership interest could nonetheless control an entity if it obtained sufficient voting rights or contractual rights. See Letter dated July 15, 1997 from Cheryl L. Newton, EPA Region IV, to Robert Hodanbosi, Ohio Environmental Protection Agency. This is consistent with the SEC guidance that control might be gained by voting rights or by contract. In this regard, the Front Range Limited Liability Agreement also precludes QMH from having authority with regard to management of the Project. Specifically, FRH is the designated Manager with broad authority to conduct the business affairs of Front Range, included but not limited to decisions relating to compliance with environmental law and control measures.

EPA documents have also identified other criteria to be evaluated to determine if control exists. These criteria, while not individually dispositive of the control issue, may signify the need to look closer at the relationship between the entities to determine if control exists. These criteria include:

- Common workforces, plant managers, security forces, corporate executive officers, or board of directors.

Front Range and PSCo do not share any of these elements.

- Shared equipment, other property or pollution control equipment.

Front Range and PSCo do not share any of these elements.

- Control of management decisions for pollution control.

Neither PSCo or QMH control any management decisions for Front Range with the limited exception that QMH may participate in limited non-environmental decisions .

- Shared payroll, employee benefits, health plans, retirement funds, or other administrative functions.

Front Range and PSCo do not share any of these elements.

- Shared responsibility for compliance with air quality control requirements or violations of such requirements.

Front Range and PSCo do not share this responsibility or liability

- Shared financial arrangements or profits and losses

Front Range and PSCo do not share any financial arrangements including profits or losses

- Dependency of one facility on the other

Front Range and PSCo do not depend on each other for their operations. If either facility did not exist the operations at the other facility could continue.

There are also some guidance documents that indicate that control can be established by contracts for service or product between two entities. For example, the August 5, 1999 letter to Frank Prager from Julie Wrend of the Colorado Department of Public Health and Environment stated that:

> [T]wo sources will be considered under common control where (1) there is a contract for service dedicating the majority of the first source's products or services to the second source; and (2) the first source's economic survival is dependent upon continued operation of the second source
>
> The second factor above requires a case-by-case determination, looking at such factors as whether the relationship between the sources is one of necessity or convenience; whether the terms of the contract create a dependence of the first source upon the second; whether the second source provides the first source with services essential to the first source's continued operation; and whether the first source would be forced to relocate if the second source no longer required the first source's output.

Front Range and PSCo's Ft. Lupton generators will not be dependent on each other for operation. Both will produce the same product (electricity), both can exist independently of each other, and any shutdown or physical impairment to one would not force the other to shut down. There will be no sharing of electricity between Front Range and PSCo's Ft. Lupton generators. Front Range will receive natural gas from PSCo either from PSCo's gas pipeline or from other existing sources of gas at Ft. Lupton. The electricity that will be purchased by PSCo from Front Range will not be used by or at the PSCo Ft. Lupton plant, but will be resold to retail customers. Because Front Range does not support the generation at PSCo's Ft. Lupton facility and could exist independently (or vice versa), there is no showing of control by supply of product. Front Range is located next to PSCo distribution facilities because of the PUC Order which mandated the location to ensure prompt peak load power in the shortest time to avoid future electrical shortages. Under this analysis, there is no question that the PSCo generating facility at Ft. Lupton and Front Range are separate facilities.

Moreover, Front Range is not dependent upon sale of electricity to PSCo. The PSCo PPA is not a contract for service, but creates a buyer/seller relationship by which a product (electricity) is being sold. As the Front Range lenders' independent marketing analyses have indicated, Front Range is a viable Project without the PSCo PPA or the e prime PPA. Front Range would not have to relocate if either or both agreements were terminated. Various sources of gas are available, and there is a viable market for the power to be generated by the Front Range facility at its existing location.

For the following reasons, we submit that PSCo's Ft. Lupton generating facility and the Front Range Project meet the standards articulated in U.S. EPA guidance for separate facilities, and are not under "common control."

- QMH owns a minority interest in the Project and cannot dictate or veto any decisions regarding the Project.
- Under the Front Range Limited Liability Company Agreement, FRH is the sole Manager of the Project and is vested with responsibility for conducting the business of the Project.
- QMH cannot, under the Limited Liability Company Agreement, become the Manager, even if FRH ceased being a member or the manager of the Company. In that event, QMH would be required to sell membership interests to an unaffiliated third party and designate the unaffiliated third party as Manager, with the lender's Independent Engineer operating as Manager in the interim.
- QMH is prohibited from voting upon any matter regarding emission and pollution controls.
- Under the PSCo PPA, PSCo cannot cause FRH to operate in violation of any laws or permit requirements regarding emissions or pollution controls.
- Negotiations between Front Range and PSCo and e prime, respectively, were conducted by FRH. Front Range was selected by an independent evaluator, which was not affiliated with PSCo. The Colorado Public Utility Commission has specifically verified the fairness of the process by which Front Range was selected.
- The location of the Front Range Project was selected because of the PUC criteria that the new generating facilities be located near existing PSCo distribution systems in order to minimize the time needed to provide additional generation.
- The Project will not be dependent upon PSCo's Ft. Lupton generators and the PSCo Ft. Lupton generators will not be dependent upon the Project. Both will produce electricity and will in effect "compete" for provision of electricity to PSCo.
- If PSCo's Ft. Lupton generating facility ceased to exist, it would not cause the Project to fail. The Front Range facility could be said to compete with the PSCo generators such that cessation of power generation from PSCo's existing

Ft. Lupton generators might benefit the Project. Conversely, if Front Range ceased to operate, PSCo's Ft. Lupton generating facility would not be affected.

- The economic viability of Front Range is not dependent upon providing electricity to PSCo.

We submit that there is no common control between PSCo and Front Range, or between QMH and Front Range such that the PSCo generators and the Front Range facility should be viewed as a single source under the Clean Air Act. We believe that the separate source status of these two facilities should allow the synthetic minor construction permit for the Front Range facility to issue so that we may begin construction within a time frame that allows us to fulfill the terms of our PPA with PSCo to provide needed power to the front range as ordered by the PUC.

Sincerely,

Martha E. Rudolph
Assistant General Counsel

09202BXZ

K N Energy, Inc.
370 Van Gordon Street
P.O. Box 281304
Lakewood, CO 80228-8304
(303) 989-1740

September 27, 1999

Richard Long
United States Environmental Protection Agency
Region VIII
999 18th Street
Suite 500
Denver, Colorado 80202-2466

Re: Front Range Energy Associates, LLC
Single/Separate Source Question

Dear Mr. Long:

On behalf of Front Range Energy Associates, LLC ("Front Range"), I would like to thank you and your staff for meeting with representatives of Front Range on Wednesday, September 22nd. We appreciate the opportunity to discuss air permitting issues related to the proposed Front Range generating facility located near Fort Lupton Colorado. The Front Range facility is an important part of the resource acquisition program prepared by Public Service Company of Colorado ("PSCo") to meet growing energy demands in the Denver Metropolitan area. We are grateful that EPA is willing to work with us on an expedited basis to resolve the Front Range permitting issues and to help prevent a reoccurrence of the power shortages Denver experienced during the summer of 1998.

In particular, we believe it was useful to list the factors that the Region considers pertinent to a determination whether the proposed Front Range facility and the nearby PSCo station are under "common control" for purposes of the definition of "stationary source" in the PSD regulations. It also was useful to reach what we believe was the Region's agreement that these determinations are made on a case-by-case basis because they require a review of the unique circumstances of the facilities involved. In our letter to you dated September 22, 1999, Front Range provided a discussion and supporting documentation of our position that the Front Range facility meets the criteria to be considered a separate source consistent with EPA and Colorado Department of Public Health and Environment ("CDPHE") memoranda/letters which, in different cases, have been deemed to provide guidance on the question of how to interpret the undefined term "common control." We understand that EPA uses the presence of these factors as indicators of "common control," and that the presence of any of these factors will cause EPA to review the particular circumstances of the sources in question to determine whether common control in fact exists. Critical in each of the "common control" determinations made by the EPA is the controlling relationship between the two specific facilities as individual or combined air pollutant emission sources. In no determination was the relationship between one facility, and the overall business enterprise of the owner of the other facility,

without reference to the operations of the individual pollutant-emitting facility itself, sufficient to demonstrate common control.

At our meeting, Region 8 articulated four factors as best defining the framework for a common control determination in this case. We understand the four factors Region 8 will focus on are as follows:

1. Common ownership which may create control;

2. Contractual arrangements which may create control over management, operations and internal policies;

3. Contracts for services which may create control; and

4. Support/Dependency ("but for" test) which may create control, e.g. Is there a symbiotic relationship between the facilities? Does one facility "support" the other such that if one facility ceased operations the second facility would fail?

NO COMMON CONTROL BY OWNERSHIP OR CONTRACTUAL POWERS

EPA appears to be concerned about two relationships involved in the Front Range facility: that between the PSCo facility and the Front Range facility, and that between Quixx Mountain Holdings, LLC ("QMH"), a member of Front Range, and Front Range. As we have discussed, Front Range is not a subsidiary of New Century Energies, Inc., the ultimate parent corporation of both PSCo and QMH, nor is it an affiliate of PSCo. PSCo does not own any interest in Front Range. Furthermore, no contractual relationship exists between PSCo and Front Range such that PSCo controls the day-to-day operations, the policies, or the management of Front Range. Thus, there is no common control between Front Range and PSCo established by ownership or by contractual arrangements over internal affairs.

In our prior letter and at the meeting, Front Range presented information and documents that we believe eliminate any question that Front Range can be controlled by QMH, a PSCO affiliate, through ownership interest and powers established under the provisions in the Limited Liability Company ("LLC") Agreement. Unlike the Region 2 Dupont guidance letter cited during our meeting, where Dupont presented no evidence regarding Dupont's power directly or indirectly to cause the direction or management and policies of DDE, we have presented significant evidence that QMH has no control over Front Range. As we have indicated, the QMH ownership interest and voting power within Front Range has been reduced to 49%, thus QMH not only does not own a majority interest, it also has no ability to control decisions through a "veto" power. Furthermore, the provisions of the LLC Agreement have been revised and restated to clearly remove QMH from operational and management decision-making. Front Range also has proposed to give assurances to the State and to the EPA, in the form of an enforceable permit condition, that the QMH ownership interest will

never exceed 49% and that the LLC will not be changed to increase control in QMH. Thus, we believe we have provided a "belt and suspenders" level of assurances in the LLC Agreement to ensure the agencies involved that there is and will be no control over the Front Range facility by PSCo through its affiliate, QMH.

NO COMMON CONTROL BY CONTRACT FOR SERVICES OR DEPENDENCY

In our meeting, we also responded to the Region's question as to whether the April 30, 1999 Power Supply Agreement (known as the "PPA") is a "contract-for service" which creates "common control" in the PSCo and FRH facilities. This is not a question of control by way of company structure, but by way of the marketplace. As we understand it, the question is whether a contract which requires that one entity sell all of its production to another entity, in effect, gives the second entity "control" over the first. We believe that application of the "contract-for-service" analysis is inappropriate in this case for two critical reasons.

First, all of the EPA guidance that we have found that has applied the "contract-for-service" test has focused on the relationship between "adjacent facilities" created by the "contract-for-service." (See November 12, 1998 letter from USEPA Region 8 to Colorado DPHE; February 20, 1998 letter from USEPA Region 4 to South Carolina DHEC; July 15, 1997 letter from USEPA Region 5 to Ohio EPA; September 18, 1995 letter from Region 7 to Iowa DNR; Undated 1998 or 1999 letter from USEPA Region 3 to Pennsylvania DEP regarding USN and NE Hub facilities; July 20, 1995 letter from USEPA Region 4 to Georgia DNR.) The PPA here creates no "dependency" relationship between the Front Range facility and the "adjacent" PSCo facility. Instead, the PPA is a contract to supply power to PSCo's transmission grid as a whole. The power sold to PSCo will not be used at the PSCo Fort Lupton station.

Second, we believe this would be the first time that EPA would apply the "contract-for-services" test to find common control in the context of the sale of power from an independent power producer to a regulated public utility. As discussed in our meeting, the only reason for the 100% service contract in this case is because of the unique posture of PSCo as a regulated public utility and, as a result, the only entity under Colorado law that can provide electricity to customers in its service territory. Thus, if its customers do not have adequate power, PSCo must acquire additional power resources from another party or build them itself. Under Public Utility Commission ("PUC") regulations, PSCo is required to request bids for new power resources in an integrated resource planning process. In this case, PSCo awarded the bid to Front Range under PUC rules. Today the Front Range facility cannot by law sell power to any other customer other than PSCo. Thus, the existence of a contract which reflects this relationship between the PSCo transmission business and the Front Range facility is not evidence that PSCo controls the Front Range facility. Similarly, the fact that PSCo has had to look to independent third party power producers to generate the additional electricity needed to service the power needs of the area was not an effort to break-up its operations to avoid pollution control laws, but rather has been mandated by the Colorado PUC. The "control" in this situation is in the hands of the State and its Public Utility Commission which have selected and

licensed PSCo as the sole provider of electricity in this area and have required that additional power be generated and that it be generated by independent entities. If the function of the "common control" test is to close a "loop hole" in the PSD program by preventing a single source from dividing up or selling off its operations to separate companies in order to circumvent the PSD permit requirements, that test is simply irrelevant in the context of a regulated, single utility state. In such cases, EPA should look beyond the mere existence of a single purchaser contract to determine whether there is "common control" between the individual facilities.

EPA appeared concerned at our meeting that because PSCo has discretion, within certain limitations, under the PPA to request when and how much power Front Range is to dispatch to PSCo, that PSCo somehow "controls" the Front Range facility. If this is the test for control, then all peaking power plants by definition are "controlled" by the utilities that they do business with. Electric power is not like tangible goods that can be placed on shelves and held in inventory until a customer requests their shipment. Electric power must be generated and fed into the transmission and distribution system at the time that it is needed. Under PUC order, PSCo was required to bid for additional peaking resources for those times when electric energy usage in Denver is especially high. For the most part, PSCo cannot store power generated by a peaking resource like Front Range for later use. To use the Front Range facility, PSCo must have the ability to order Front Range to generate the power when it is needed. In other words, as a practical and technical matter, PSCo must have the right to determine when the Front Range facility runs.

Under the PPA, it is Front Range's responsibility to comply with all environmental laws, and the PPA is clear that PSCo cannot demand that the facility generate power in a way that will require a violation of its air quality permit. If the Front Range facility is subject to a 249 ton per year NOx emission limitation, PSCo has no authority to demand that the facility run more frequently in a way that will result in a violation of this limitation. PSCo also has no authority to dictate any other operating practices of the facility. Thus, the fact that PSCo can demand power as needed in itself is not indicative of a power to so dominate Front Range that it should be considered a single source with the PSCo station under the PSD requirements.1

The critical question is whether the "contract-for-service" creates a relationship between the two "adjacent" facilities such that one is dependent on the operations of the other. The short answer to this question is that the Front Range facility is a completely "stand alone" facility that is not tied to and does not require goods or services from the facilities located on the adjacent PSCo property.

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1 We have pointed out that the provisions of the PPA are standard in the industry. For example, Section 10.5 which creates an "Operating Committee" on which PSCo has a representative is standard in any agreement for sale of power from a wholesaler to a retailer. As noted in Section 10.5, the function of that Committee is solely to develop written operating procedures which are "intended as a guide on how to integrate the [Front Range facility] and its electrical output into PSCo's system." These standard procedures are necessary to allow for the coordination of the delivery and receipt of the electricity generated by Front Range. These provisions do not create control by PSCo. In fact, Section 10.5 specifically states that PSCo is not an operator of the facility and has no responsibility for day-to-day operations. Similarly, in Section 18.3, PSCo's consent is required for the transfer of membership interest in Front Range. This, again, is a standard provision in contracts in this industry as the power purchaser has a justifiable interest in the qualifications of a power plant operator from which it buys power.

The circumstances surrounding the locations of the Front Range and PSCo "adjacent" facilities is very different from the "adjacent" facilities that are the subject matter of the various EPA letters and guidance documents.2 In every one of the EPA letters and guidance documents we have found there is some relationship between the goods or services produced at one facility and the goods or services produced at the other facility. Here there is no such relationship.

Significantly, the Front Range facility operates completely independently of the generators on the PSCo site. The Front Range facility does not use or depend upon the power generated at the PSCo station and the PSCo station does not use or depend upon the power generated from the Front Range facility. If the nearby PSCo facility did not exist, the Front Range facility would nonetheless be able to produce and transmit power, just as it is planning to. The natural gas pipelines running beneath the Front Range facility allow Front Range to obtain natural gas for fuel from alternate sources. Under Colorado law, Front Range would also be able to use PSCo's transmission lines for sales and transmission of power to purchasers of electricity other than PSCo. The viability of the Front Range facility independent from PSCo was the conclusion found in the market analysis of the project, prepared for the lender of the Front Range facility. This finding of independent viability was a critical element for the lender to agree to fund the Front Range project.

From the other perspective, the PSCo station is not dependent on, or supported by, the Front Range facility. The electricity generated at the Front Range facility is not used to support any operations or production on the adjacent property nor is it stored, processed, packaged or in any manner "serviced" at the "adjacent" PSCo facility. The Front Range generated electricity enters the PSCo transmission system at the point it leaves the Front Range facility via PSCo transmission lines for sale to and use by PSCo's thousands of customers. The decision to dispatch the Front Range facility is not made because of any requirements for power at the PSCo station, nor is the decision to dispatch made at the Fort Lupton PSCo station. Thus, the power generated from the Front Range facility is like any other product which is sold on a wholesale basis to a distributor for resale to its customers. Furthermore, the sale is not a sale to the adjacent facility, but to the PSCo transmission network. Neither the adjoining PSCo station nor the entire PSCo transmission network will fail if the Front Range Project does not exist.

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2 The location of the Front Range facility was chosen based upon the close proximity to alternative sources of natural gas and to transmission lines with sufficient capacity to transmit the power generated at the Front Range facility. The Front Range project, like all generating stations, needs access to a fuel supply, here in the form of a natural gas pipeline, and it needs access to transmission lines capable of transmitting its power to the load center. The decision to locate near the PSCo Fort Lupton station was not a requirement for the viability of the Front Range facility, but was made because of the presence of the transmission capacity lines and natural gas sources and the ease with which Front Range can purchase the property on which it will locate from the KN Energy, Inc. affiliate. Locating the Front Range facility near the PSCo station was not a requirement for the operations of either facility, or for the viability of the Front Range project, and is in large part a mere coincidence

CONCLUSION

As the above discussion demonstrates, the factors designed to demonstrate common control between adjacent facilities are simply not present here. Unlike the Dupont matter, no voting ownership, or contractual control exists between PSCo and Front Range, or between QMH and Front Range. Unlike the Trigen Power Plant and the Coors Brewery situation, PSCo does not depend on the Front Range facility to supply all of the power needed by PSCo, Front Range is not dependent on the PSCo station, there is no dependency between the facilities for pollution control, the Front Range facility is not located on PSCo owned property or on property leased from PSCo. Although all power generated for the first seven years of the approximately 30 to 40 year life of the Front Range facility will be sold to PSCo, Front Range has contracted for the sale of its power to a different purchaser, e prime, beginning the eighth year of its operation. Although an affiliate of PSCo, e prime has no ownership interest in, nor does it operate the PSCo Fort Lupton facility. Moreover, during the second half of the project's life, Front Range anticipates (and, indeed, is counting on) the restructuring of the Colorado electric industry so that it can sell power to any customer that will pay it the right price.

Where, as here, there is no evidence of direct control, the EPA looks at many factors to determine whether there is common control between two sources. In our review of EPA guidance and letters, in the absence of direct control, EPA relied on no one factor alone to make a finding of common control. Rather, a finding of common control was made only after EPA found evidence of the presence of number of common control factors. The absence of factors of common control in this case, we believe, should lead EPA to the conclusion that the proposed Front Range facility and the existing PSCo Fort Lupton station are not under common control.

Significantly, there are two fundamental differences between this case and all other EPA determinations of common control available for review. First, finding common control here would be the first time EPA has made such a finding where there is no relationship between the adjacent facilities. Region 8's attention on the business relationship between the Front Range facility and PSCo as a whole, without regard to the PSCo station, is an unnecessary departure from traditional application of the "contract-for-services" test. Second, finding common control here would be the first time EPA has made such a finding because of the specific contractual relationship mandated by public utility law. A determination based upon either of these findings has significant national ramifications that go well beyond the reasoning behind the common control test.

We appreciate EPA's willingness to consider these issues on an expedited basis. We thank EPA for its recognition of the importance of the Front Range facility not only to the companies involved, but, more importantly, to the people of the metropolitan area. Please let me know if you

have any questions. We look forward to hearing from you.

Sincerely,

Martha E. Rudolph
Assistant General Counsel

cc: Terry Lucas, USEPA
Jonah Staller, USEPA
David Ouimette, APCD
Jill Cooper, APCD
Dennis Myers, APCD
Casey Shpall, Colorado AGO

TABLE OF CONTENTS

Model Power Supply Agreement

SALE OF
ELECTRIC CAPACITY AND ENERGY
TO
PUBLIC SERVICE COMPANY OF COLORADO

THIS AGREEMENT is made this _____ day of _____, by and between _____ ("Seller"), a _____ corporation with a principal place of business at _____, _____, and Public Service Company of Colorado ("PSCo"), a Colorado corporation with headquarters in Denver, Colorado.

WHEREAS Seller desires to construct, own, and operate an electric generating plant to be located at *[location of Facility]*, identified as the "Facility", and to interconnect the Facility with the PSCo electric system; and

WHEREAS Seller desires to sell to PSCo all of the electric power and energy output from the Facility and PSCo desires to buy the same from Seller; and

WHEREAS Seller has responded to PSCo's Request for Proposal to solicit bids for firm electric capacity and energy and PSCo has accepted Seller's offer in accordance with the terms and conditions set forth in this Agreement.

NOW THEREFORE, in consideration of the mutual covenants herein contained, the sufficiency and adequacy of which are hereby acknowledged, the Parties agree to the following:

Article 1 - Definitions

The terms listed in this Article shall have the meanings set forth herein whenever the terms appear in this Agreement, whether in the singular or the plural or in the present or past tense. Terms not listed in this Article and otherwise used in this Agreement shall have meanings as commonly used in Good Utility Industry Practice.

1.1 "Agreement" means this Agreement between Seller and PSCo, including the Exhibits attached hereto.

1.2 "Automatic Generation Control," or "AGC," means the automatic regulation within predetermined limits of the power output of electric generators within a Control Area in response to changes in system load, system frequency, tieline load, or the relation of these to each other, so as to maintain the scheduled system frequency and/or the established interchange with other Control Areas. This

regulation is accomplished through communication links between the PSCo System Control Center ("SCC") Energy Management System ("EMS") computer and each generator equipped for such control. For a generator to be considered capable of AGC by PSCo, the generator must meet PSCo's Requirements and Compliance Standards for Dispatchability, as such are updated from time to time by PSCo. PSCo's current Requirements and Compliance Standards for Dispatchability are attached hereto and made a part hereof as Exhibit A.

1.3 "Commercial Operation" means the first day the Facility shall be fully capable of producing electrical energy at the Net Capability and has satisfied the conditions specified in Article 4.7.

1.4 "Commercial Operation Date" means the first day of the month immediately following the date PSCo notifies Seller that the Facility has achieved Commercial Operation.

1.5 "Commission(s)" means any of the state or federal regulatory agencies having jurisdiction over PSCo including, but not limited to, the Colorado Public Utility Commission ("CPUC"), or the Federal Energy Regulatory Commission ("FERC"), or successor agencies.

1.6 "Construction Milestone" means the date set forth in Exhibit B by which Seller must achieve the result(s) specified for that date.

1.7 "Control Area" means PSCo's system of electrical generation, distribution, and transmission facilities within which generation is regulated in order to maintain interchange schedules with other such systems.

1.8 "CPUC" means the Colorado Public Utility Commission.

1.9 "Emergency" means a condition or situation that, in the sole judgment of either PSCo or WSCC, affects or will affect PSCo's ability, or the ability of any member of WSCC, to maintain safe, adequate, and continuous electric service.

1.10 "Environmental Contamination" means the presence of hazardous wastes, hazardous substances, hazardous materials, toxic substances, hazardous air pollutants and other hazardous pollutants, and toxic pollutants, as those terms are used in the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation and Liability Act, the Hazardous Materials Transportation Act, the Toxic Substances Control Act, the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, the Oil Pollution and Hazardous Substances Control Act, and all other applicable federal, state, and local laws and regulations as amended, at such levels or quantities or location, or of such form or character, to be of regulatory concern under said federal, state, and local laws and regulations.

1.11 "Event of Default" means an event as defined in Article 12 that confers a contractual right upon the non-defaulting Party to terminate the Agreement.

1.12 "Facility" means all of the following, the purpose of which is to produce and sell electricity: Seller's equipment, property, buildings, turbines, generators, step-up transformer(s), boiler(s), output breakers, and necessary transmission lines to connect to the Interconnection Point, protective and associated equipment, improvements, and other tangible and intangible assets, property rights and contract rights reasonably necessary for the construction, operation, and maintenance of the electric generating facility that produces the power and energy being sold under this Agreement.

1.13 "Financing Documents" means the loan and credit agreements, notes, bonds, indentures, security agreements, lease financing agreements, mortgages, interest rate exchanges, or swap agreements and other documents relating to the development, bridge, construction and/or the permanent financing for the Facility, including any credit enhancement, credit support, working capital financing, or refinancing documents, and any and all amendments, modifications, or supplements to the foregoing that may be entered into from time to time.

1.14 "Forced Outage" means any condition at a Facility that requires immediate removal of the Facility from service, another outage state, or a reserve shutdown state. This type of outage results from immediate mechanical/electrical/hydraulic control system trips and operator-initiated trips in response to Facility alarms.

1.15 "Good Utility Industry Practice(s)" means the practices, methods, and acts (including but not limited to the practices, methods, and acts engaged in or approved by a significant portion of the electric utility industry, WSCC and/or NERC) that, at a particular time, in the exercise of reasonable judgment in light of the facts known or that should reasonably have been known at the time a decision was made, would have been expected to accomplish the desired result in a manner consistent with law, regulation, codes, standards, equipment manufacturer's recommendations, reliability, safety, environmental protection, economy, and expedition. With respect to the Facility, Good Utility Industry Practice(s) include, but are not limited to, taking reasonable steps to ensure that:

(1) equipment, materials, resources, and supplies, including fuel and spare parts inventories, are available to meet the Facility's needs;

(2) sufficient operating personnel are available at all times and are adequately experienced and trained and licensed as necessary to operate the Facility properly, efficiently, and in coordination with PSCo and are capable of

responding to reasonably foreseeable emergency conditions whether caused by events on or off the site of the Facility;

(3) preventive, routine, and non-routine maintenance and repairs are performed on a basis that ensures reliable long-term and safe operation, and are performed by knowledgeable, trained, and experienced personnel utilizing proper equipment and tools;

(4) appropriate monitoring and testing are performed to ensure equipment is functioning as designed;

(5) equipment is not operated in a reckless manner, or in a manner unsafe to workers, the general public, or PSCo's system or contrary to environmental laws or regulations or without regard to defined limitations such as steam pressure, temperature, and moisture content, chemical content of make-up water, flood conditions, safety inspection requirements, operating voltage, current, volt-ampere reactive (VAR) loading, frequency, rotational speed, polarity, synchronization, and/or control system limits; and

(6) the equipment will function properly under both normal and emergency conditions at the Facility and/or on PSCo's system.

1.16 "Interconnection Facilities" means all the land, easements, materials, equipment, and facilities installed for the purpose of interconnecting the Facility and PSCo's electric system so as to permit the transfer of electric power and energy in either direction, including but not limited to electrical interconnection, transformation, switching, metering, relaying, and communication and safety equipment, and any necessary additions and reinforcements to PSCo's system required for safety or system security as a direct result of the interconnection between the Facility and PSCo's system.

1.17 "Interconnection Guidelines" means PSCo's Safety, Interference, and Interconnection Guidelines for Cogenerators, Small Power Producers and Customer-Owned Generators as it is revised from time to time by PSCo. The current Interconnection Guidelines are included in Exhibit C to this Agreement, which is attached hereto and made a part hereof.

1.18 "Interconnection Point" means the physical point at which electrical interconnection is made between the Facility and the PSCo system.

1.19 "Metering Device(s)" means all PSCo owned meters, metering equipment, and data processing equipment used to measure, record, or transmit data relating to the electric power and energy output from or input to the Facility.

1.20 "NERC" means the North American Electric Reliability Council or any successor organization.

1.21 "Net Capability" means the net power output, in kilowatts (kW), that can be made available by the Seller from the Facility, under best conditions, at the Point(s) of Delivery. The Net Capability of the Facility is specified in Article 3.

1.22 "On-Peak Months" means the calendar months of January, February, June, July, August, September and December.

1.23 "Operating Committee" means one representative each from PSCo and Seller pursuant to Article 10.5 of this Agreement.

1.24 "Operating Records" means all agreements associated with the Facility, operating logs, blueprints for construction, invoices for all Facility equipment, operating manuals, all warranties on equipment, and all documents, whether in printed or electronic format, that the Seller uses or maintains for the operation of the Facility.

1.25 "Point(s) of Delivery" means the electric system point(s) at which Seller makes available to PSCo and delivers to PSCo the power and energy being provided by Seller to PSCo under this Agreement. The Point(s) of Delivery shall be specified in Exhibit D to this Agreement.

1.26 "PSCo's Interconnection Facilities" means all Interconnection Facilities on PSCo's side of the Interconnection Point.

1.27 "Scheduled Outage/Derating" means a planned interruption/reduction of the Facility's generation that (a) has been coordinated in advance with PSCo with a mutually agreed start date and duration and (b) is required for inspection, or preventive or corrective maintenance.

1.28 "Seller's Interconnection Facilities" means all Interconnection Facilities on Seller's side of the Interconnection Point.

1.29 "Senior Debt" mans the obligations of the Seller to any lender pursuant to the Financing Documents, including without limitation, principal of, premium and interest on indebtedness, fees, expenses or penalties, amounts due upon acceleration, prepayment or restructuring, swap or interest rate hedging breakage costs and any claims or interest due with respect to any of the foregoing.

1.30 "Senior Lender" means, collectively, any lender(s) providing any Senior Debt and any successor(s) or assigns thereto.

1.31 "System Control Center," or "SCC," means PSCo's facility responsible for centralized dispatch of generating units within its Control Area and control of tie-line power flows.

1.32 "Term" means the period of time during which this Agreement shall remain in force and effect.

1.33 "Utility Grade Equipment" means equipment or components that to the extent required by Good Utility Industry Practice are manufactured to a higher standard of durability than that commonly required for commercial applications.

1.34 "Western System Coordination Council" or "WSCC" means the regional electric reliability council (one of the ten regional councils of NERC), or its successor agency, of which PSCo is a member.

Article 2 - Term and Termination

This Agreement shall become effective as of the date of its execution, and shall remain in full force and effect through _____, subject to the early termination provisions set forth herein. Applicable provisions of this Agreement shall continue in effect after termination to the extent necessary to satisfy the terms and conditions of this Agreement and, as applicable, to provide for: disconnection of the Facility from PSCo's electric system, final billings and adjustments related to the period prior to termination, repayment of any money due and owing PSCo pursuant to this Agreement, repayment of principal and interest associated with security funds, and the indemnifications specified in this Agreement.

Article 3 - Facility Description

3.1 Summary Description. Seller intends to construct, own, operate, and maintain the Facility, which is a _____ facility on a site located in_____ having a designed net power output capability of approximately _____ MW. Exhibit E to this Agreement, which attached hereto and made a part hereof, provides a complete description of the Facility, including identification of the equipment and components which make up the Facility.

3.2 Site. The Facility shall be located at:
Project Name: _____
Site Name: _____
Street Address: _____
City/State: _____

A scaled U.S.G.S. map that identifies the Facility location, the location of Interconnection Facilities, and the location of the important ancillary facilities, including transmission lines, is included in Exhibit E to this Agreement.

3.3 General Design and Construction of the Facility. Seller shall construct the Facility, either by itself or through outside contractors, according to Good Utility Industry Practice(s) and PSCo's Interconnection Guidelines in a workmanlike, professional manner. Seller shall utilize in all respects Utility Grade Equipment. If the Seller plans to install used equipment as part of the Facility, such equipment must be approved by PSCo prior to purchase of such equipment. Approval of the utilization of used equipment by PSCo shall not constitute a warranty or guarantee of the equipment and as between the Parties Seller shall be responsible for the design, construction, installation and operation of the Facility. The Facility shall be:

(A) capable of immediate disconnection from the PSCo system in event of a system emergency;

(B) capable of supplying power without harmonic distortion in compliance with the requirements of the Interconnection Guidelines;

(C) capable of operating at power factor of ninety percent (90%) leading/lagging or greater, as measured at the Point(s) of Delivery, and in accordance with the provisions of Article 5.2;

(D) equipped with a Power System Stabilizer ("PSS") for each generating unit in accordance with the Interconnection Guidelines;

(E) equipped with a generator excitation system with automatic voltage regulators, which shall include an over-excitation limiter;

(F) equipped with communication circuits from the Facility to PSCo's SCC for the purpose of telemetering, supervisory control/data acquisition, and voice communications as required for Automatic Generation Control (AGC) by PSCo;

(G) equipped with protective devices and generator control systems designed in accordance with PSCo's specifications in the Interconnection Guidelines and Good Utility Industry Practice(s);

(H) capable of Automatic Generation Control (AGC) by PSCo; and

(I) capable of providing an immediate and sustained response to abnormal frequency excursions as defined in the Interconnection Guidelines.

3.4 Net Capability. The Net Capability of the Facility shall be ___ kW as measured at the Point(s) of Delivery.

Article 4 - Construction Milestones

4.1 Commercial Operation Date. The Facility shall achieve Commercial Operation and Seller shall be fully capable of reliably producing, at the Facility, the power and energy to be provided under this Agreement, and deliver such power and energy to PSCo at the Point(s) of Delivery, no later than May 1, 2000.

4.2 Construction Milestone Dates. In order to meet the Commercial Operation Date, Seller agrees to meet the Construction Milestones set forth in Exhibit B to this Agreement.

4.3 Site Acquisition. Seller shall provide PSCo adequate assurances that the real property upon which the Facility is to be located is sufficient to reliably construct and operate the Facility for the Term of this Agreement. These assurances include but are not limited to the following matters:

(A) The site must be in a location that permits PSCo to interconnect its system with the Facility on a timely basis without incurring greater than average expense. Neither the site itself nor the surrounding area in which the Interconnection Facilities will be located shall possess any qualities or attributes that would make the use of eminent domain by PSCo for purposes of acquiring right of way for transmission facilities to connect to the Facility either legally impossible or improbable (e.g., land owned by the federal government, park land, protected wetlands) or subject to unreasonable restrictions or complications (e.g., historic cultural site, severe terrain, zoning restrictions).

(B) To assure continuous operation of the Facility during the Term of this Agreement, Seller shall conduct an environmental investigation of the site and shall provide PSCo with a copy of a report summarizing such investigation, together with any data or information generated pursuant to such investigation. Seller shall provide assurances to PSCo that the site acquired for the Facility has been inspected for Environmental Contamination and the site complies with all applicable governmental laws, regulations, or requirements relating to environmental or occupational health and safety matters and Hazardous Materials. The term "Hazardous Materials" shall mean any substance, material, gas, or particulate matter that is regulated by any local governmental authority, any applicable State, or the United States of America, as an environmental pollutant or dangerous to public health, public welfare, or the natural environment including, without limitation, protection of non-human forms of life, land, water, groundwater, and air, including, but not limited to, any material or substance that is (i) defined as "toxic," "polluting," "hazardous waste," "hazardous material," "hazardous substance," "extremely hazardous waste," or "restricted hazardous waste" under any provision of local, state, or federal law, (ii) petroleum; (iii) asbestos; (iv) polychlorinated biphenols; (v) radioactive material; (vi) designated as a "hazardous substance" pursuant to the

Clean Water Act, 33 U.S.C. §1251 *et seq.* (33 U.S.C. §1251); (vii) defined as a "hazardous waste" pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. §6901 *et seq.* (42 U.S.C. §6901); (viii) defined as a "hazardous substance" pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601 *et seq.* (42 U.S.C. §9601); (ix) defined as a "chemical substance" under the Toxic Substances Control Act, 15 U.S.C. §2601 *et seq.* (15 U.S.C. §2601); or (x) defined as a pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §136 *et seq.* (7 U.S.C. §136). The term "all applicable governmental laws" in this Article 4.3 shall include all statutes specifically described in the foregoing sentence and all federal, state, and local environmental health and safety statutes, ordinances, codes, rules, regulations, orders, and decrees regulating, relating to, or imposing liability or standards concerning or in connection with Hazardous Materials. In connection with the operation and use of the site, there are no incinerators or cesspools on the site; all waste is discharged into a government-approved sewage disposal system; and no Hazardous Materials are discharged from the site, directly or indirectly, into any body of water, except as authorized by applicable governmental laws.

4.4 Facility Contracts. To assure PSCo that the Facility will be capable of meeting the Commercial Operation Date and will be capable of providing reliable electric power and energy for the Term of this Agreement, Seller shall provide to PSCo copies of all major contracts requested by PSCo which govern the design and construction of the Facility, and the ability of the Seller to deliver power and energy to PSCo at the Point(s) of Delivery, within the time frames specified by the Construction Milestones. These contracts shall include, but not be limited to the following: contracts for the manufacture and installation of the generating equipment and step-up transformer; major engineering drawings; construction contracts; transmission and ancillary service agreements; and all governmental permits necessary to construct and operate the Facility. Seller shall certify to PSCo, in a form of certification acceptable to PSCo, on or before the applicable Construction Milestone Date, that Seller has obtained commitments for sufficient fuel supply to generate the power and energy required by this Agreement commencing with the Commercial Operation Date. Seller shall also provide PSCo reasonable assurances that it has the capability to finance construction of the Facility. Information that is commercially sensitive may be redacted from the contracts provided to PSCo for review. Seller must provide sufficient information for PSCo to be reasonably assured that Seller has contracted with financially responsible vendors as part of the Facility construction process.

4.5 Monthly Reports. Seller shall submit to PSCo, on the first day of each calendar month until the Facility commences Commercial Operation, progress reports in a form reasonably satisfactory to PSCo. These progress reports shall notify PSCo of the current status of each Construction Milestone.

4.6 PSCo's Rights During Construction. PSCo shall have the right to monitor the construction, start-up, and testing of the Facility, and Seller shall comply with all reasonable requests of PSCo with respect to these events. Seller shall cooperate in such physical inspections of the Facility as may be reasonably required by PSCo during and after completion of construction. PSCo's technical review and inspection of the Facility shall not be construed as endorsing the design thereof nor as any warranty of the safety, durability, or reliability of the Facility.

4.7 Conditions to Commercial Operation. PSCo will notify Seller when the Facility has reached its Commercial Operation. This designation is contingent upon Seller providing evidence reasonably acceptable to PSCo of the satisfaction or occurrence of all of the following:

(A) successful completion of required testing of the Facility has occurred for purposes of financing, project operation, PSCo's planning and reporting, and manufacturers' warranties, including the initial summer or winter Seasonal Capacity Test specified in Article 10.4;

(B) the Facility is in compliance with PSCo's Interconnection Guidelines, has met the requirements for AGC by PSCo, has achieved initial synchronization with the PSCo system, and has demonstrated the reliability of its communications systems and communications with PSCo's SCC;

(C) the Facility has generated electricity continuously on AGC for a period of three days, without experiencing any abnormal operating conditions, synchronized to the PSCo system;

(D) an independent professional engineer's certification has been obtained by Seller stating that the Facility has been completed in all material respects (excepting punch list items that do not materially and adversely affect the ability of the Facility to operate as intended hereunder) in accordance with this Agreement;

(E) the security arrangements meeting the requirements of Article 11 have been established;

(F) certificates of insurance coverages or insurance policies required by Article 16 have been obtained and submitted to PSCo;

(G) an opinion of Seller's counsel has been rendered that all permits, licenses, approvals, and other governmental authorizations required for the construction and operation of the Facility in accordance with this Agreement have been obtained;

(H) the interconnection of the Facility to the PSCo system has been completed in accordance with and tested satisfactory to the standards of the Interconnection Guidelines and Good Utility Industry Practices;

(I) Seller is in all material respects in compliance with the terms and conditions of this Agreement.

4.8 Pre-Commercial Operation Energy. To assist in the testing of the Facility, PSCo agrees to purchase the test energy produced by the Facility prior to the Commercial Operation Date. PSCo shall purchase this test energy at a rate which is equal to seventy-five percent (75%) of the rate that PSCo pays under its electric tariffs for energy from Qualifying Facilities in the year that the test energy is supplied.

Article 5 - Interconnection Facilities and Metering

5.1 Interconnection Facilities and Protective Systems. Seller shall design and construct its Interconnection Facilities to protect PSCo's system. Design and specification of protective relaying, alarming, fault recording, control, metering, and related systems for generators, high voltage switchgear, step-up transformers, and plant service transformers shall be subject to PSCo's discretionary review and approval. All protective systems must be in compliance with PSCo's Interconnection Guidelines. Seller shall permit PSCo to conduct an acceptance test of certain components of protective systems prior to initial synchronization and at certain periodic intervals following initial synchronization.

5.2 Protection of the PSCo System.

(A) The Facility shall be designed to generate and deliver power and energy into the PSCo system as three-phase alternating current with a nominal frequency of sixty (60) hertz and a nominal voltage of _____ kV. Seller shall cause its deliveries of power and energy to be consistent with the Interconnection Guidelines with respect to maintenance of frequency and avoidance of voltage transients. The Facility shall be capable of operating on automatic voltage regulation pursuant to WSCC or NERC requirements and be capable of providing VAR levels to support PSCo's system voltage requirements at the Point(s) of Delivery. The Facility shall operate at power factor levels determined by PSCo's electric system requirements and changed solely at the direction of PSCo's SCC operator.

(B) The Facility shall be equipped to provide adequate voltage and frequency regulation to operate in parallel with PSCo's electric system without causing a degradation of service to PSCo's electric system or the system of other electric suppliers. The Facility shall be equipped to provide governor frequency response corresponding to a nominal five percent (5%) droop characteristic or such

governor frequency response as required by WSCC or NERC, whichever is the more stringent standard.

(C) Seller agrees that PSCo shall have the right, exercisable in the sole determination of PSCo, to disconnect the Facility from PSCo's system:

(1) during an Emergency on PSCo's system; or

(2) if, in the sole judgment of PSCo, such disconnection is necessary to prevent damage to its equipment or the equipment of its customers, or to maintain electric service to its customers; or

(3) if, in the sole judgment of PSCo, such disconnection is required to permit (a) repairs to PSCo's system, (b) new construction, or (c) the connection of other lines, customers, or producers of power and energy; or

(4) if, in the sole judgment of PSCo, such disconnection is required for equipment maintenance or to facilitate restoration of line outages; or

(5) if, in the sole judgment of PSCo, such disconnection is necessary for the operation of PSCo's system consistent with Good Utility Industry Practice.

(D) Seller shall bear its proportional share of any cost incurred by PSCo as a result of any such disconnection or resulting reconnection to the Facility if the disconnection was caused in whole or in part by a problem with Seller's operation.

(E) PSCo shall (i) use ordinary care to avoid interruptions in the acceptance of power and energy from the Facility, (ii) keep Seller fully informed as to the anticipated duration of each interruption, and (iii) promptly resume acceptance of power and energy from Seller once the condition resulting in the interruption has abated sufficiently.

5.3 Communication Equipment. Seller shall provide a dedicated voice grade telephone extension accessible through touch tone dialing (DTMF) without human operator intervention to the metering point, so that remote interrogation of the metering equipment can be accomplished. Subsequent technological advances will be installed as reasonably required in accordance with Good Utility Industry Practices. Seller shall provide a dedicated telecommunications circuit for the purpose of telemetering to the location of PSCo's System Control Center. Such telemetering equipment shall perform in accordance with requirements established by PSCo.

5.4 Notice of System Changes. PSCo and Seller shall provide each other with timely notice of any changes in their respective systems or facilities that may affect the proper coordination of safety devices on the two systems, and shall notify

each other immediately in the event that hazardous or unsafe conditions associated with operations pursuant to this Agreement are discovered to exist. Upon Commercial Operation of the Facility, changes to the Seller's Interconnection Facilities cannot be made other than with the express prior written approval of PSCo.

5.5 Relay Trip Test. Each year Seller's interconnection relay equipment and generator control equipment shall be tested by a qualified power system protection and control contractor to demonstrate proper protective equipment activation and interlocks. Thirty (30) calendar days prior to the scheduled test date, Seller shall notify PSCo of the protection and control contractor selected by Seller and coordinate the test date with PSCo. If Seller fails to perform such test within forty-five (45) days after Seller's anniversary of the Commercial Operation Date, PSCo, may, at its sole discretion, physically interrupt the flow of energy from the Facility until such test has been completed. PSCo may require Seller to reschedule the demonstration test if Seller fails to notify PSCo of the scheduled date of test. PSCo, at its sole discretion, may be present to witness testing of equipment. Seller's protection and control contractor shall document the demonstration test in a report certified by qualified personnel with experience in power system protection and control. A copy of the test report shall be provided to PSCo within fifteen (15) business days after testing has been completed. PSCo may require Seller to reschedule such test if the demonstration of such test or reported test results do not conform or adhere to PSCo's Interconnection Guidelines.

5.6 Relay Calibration. Every three years Seller's interconnection relay equipment and generator control equipment shall be calibrated by a qualified power system protection and control contractor. Thirty (30) calendar days prior to the scheduled calibration date, Seller shall notify PSCo of the protection and control contractor selected by Seller and coordinate the calibration date with PSCo. If Seller fails to perform such calibration within forty-five (45) days after Seller's anniversary of the Commercial Operation Date, PSCo, may at its sole discretion, physically interrupt the flow of energy from the Facility until such calibration has been completed. PSCo may require Seller to reschedule the calibration date if Seller fails to notify PSCo of the scheduled date of calibration. PSCo shall be present to witness calibration of equipment. Seller's protection and control contractor shall document the calibration in a report certified by qualified personnel with experience in power system protection and control. A copy of the report shall be provided to PSCo within fifteen (15) business days after calibration has been completed. PSCo may require Seller to reschedule such calibration if the demonstration of such calibration or reported calibration results do not conform or adhere to the Interconnection Guidelines.

5.7 Seller's Modifications to Equipment. If Seller proposes changes or modifications to the Facility generator control and protective equipment or interlocks, Seller shall notify PSCo, in writing, of such proposed changes or modifications at

least ninety (90) calendar days prior to the planned implementation of such changes or modifications. Seller's notice to PSCo shall include three (3) sets of drawings and specifications of such changes or modifications for PSCo's review and approval. If PSCo agrees to the proposal changes or modifications, PSCo shall provide Seller with a written approval or revisions of such drawings and specifications within thirty (30) business days of receipt. If at any time, PSCo observes any generator control or protective equipment which appears to have been changed or failed, PSCo shall have the right, at its discretion, to disconnect the Facility from PSCo's electric system and may require, at Seller's expense, a new calibration and activation test of Seller's generator control equipment or protective equipment after such equipment has been corrected or repaired.

5.8 Access to Facility. Appropriate representatives of PSCo shall at all reasonable times, including weekends and nights, and with reasonable prior notice, have access to the Facility, including the control room and Seller's Interconnection Facilities, to read and maintain meters and to perform all inspections, maintenance, service, and operational reviews as may be appropriate to facilitate the performance of this Agreement. While at the Facility, such representatives shall observe such reasonable safety precautions as may be required by Seller and shall conduct themselves in a manner that will not interfere with the operation of the Facility.

5.9 Metering Devices.

(A) All Metering Devices used to measure the net power and energy made available to PSCo by Seller under this Agreement and to monitor and coordinate operation of the Facility shall be owned, installed, and maintained by PSCo. If Metering Devices are not installed at the Point(s) of Delivery, meters or meter readings will be adjusted to reflect losses from the Metering Devices to the Point(s) of Delivery. All Metering Devices used to provide data for the computation of payments shall be sealed and only PSCo shall break the seal when such Metering Devices are to be inspected and tested or adjusted in accordance with this Article. The number, type, and location of such Metering Devices shall be specified by PSCo.

(B) PSCo, at its own expense, shall inspect and test all Metering Devices upon installation and at least annually thereafter. PSCo shall provide Seller with reasonable advance notice of, and permit a representative of Seller to witness and verify, such inspections and tests, provided, however, that Seller shall not unreasonably interfere with or disrupt the activities of PSCo and shall comply with all of PSCo's safety standards. Upon request by Seller, PSCo shall perform additional inspections or tests of any Metering Device and shall permit a qualified representative of Seller to inspect or witness the testing of any Metering Device, provided, however, that Seller shall comply with all of PSCo's safety standards. The actual expense of any such requested additional inspection or testing shall be borne by Seller, unless upon such inspection or testing a Metering Device is found to

register inaccurately by more than the allowable limits established in this Article, in which event the expense of the requested additional inspection or testing shall be borne by PSCo. If requested by Seller in writing, PSCo shall provide copies of any inspection or testing reports to Seller.

(C) Seller may elect to install and maintain, at its own expense, backup metering devices ("Seller's Back-Up Metering") in addition to those installed and maintained by PSCo, which installation and maintenance shall be in a manner acceptable to PSCo. Seller, at its own expense, shall inspect and test Seller's Back-Up Metering upon installation and at least annually thereafter. Seller shall provide PSCo with reasonable advance notice of, and permit a representative of PSCo to witness and verify, such inspections and tests, provided, however, that PSCo shall not unreasonably interfere with or disrupt the activities of Seller and shall comply with all of Seller's safety standards. Upon request by PSCo, Seller shall perform additional inspections or tests of Seller's Back-Up Metering and shall permit a qualified representative of PSCo to inspect or witness the testing of Seller's Back-Up Metering, provided, however, that PSCo shall comply with all of Seller's safety standards. The actual expense of any such requested additional inspection or testing shall be borne by PSCo, unless, upon such inspection or testing, Seller's Back-Up Metering is found to register inaccurately by more than the allowable limits established in this Article, in which event the expense of the requested additional inspection or testing shall be borne by Seller.

(D) If any Metering Devices, or Seller's Back-Up Metering, are found to be defective or inaccurate, they shall be adjusted, repaired, replaced, and/or recalibrated as near as practicable to a condition of zero error by the Party owning such defective or inaccurate device and at that Party's expense.

5.10 Adjustment for Inaccurate Meters. If a Metering Device, or Seller's Back-Up Metering, fails to register, or if the measurement made by a Metering Device, or Seller's Back-Up Metering, is found upon testing to be inaccurate by more than one percent (1.0%), an adjustment shall be made correcting all measurements by the inaccurate or defective Metering Device, or Seller's Back-Up Metering, for both the amount of the inaccuracy and the period of the inaccuracy, in the following manner:

(A) In the event that PSCo's Metering Device is found to be defective or inaccurate, the Parties shall use Seller's Back-up Metering, if installed, to determine the amount of such inaccuracy, provided, however, that Seller's Back-Up Metering has been tested and maintained in accordance with the provisions of this Article. In the event that Seller's Back-up Metering is also found to be inaccurate by more than one percent (1.0%), the Parties shall estimate the amount of the necessary adjustment on the basis of deliveries of net power and energy from the Facility during periods of similar operating conditions when the Metering Device was

registering accurately. The adjustment shall be made for the period during which inaccurate measurements were made.

(B) In the event that the Parties cannot agree on the actual period during which the inaccurate measurements were made, the period during which the measurements are to be adjusted shall be the shorter of (i) the last one-half of the period from the last previous test of the Metering Device to the test that found the Metering Device to be defective or inaccurate, or (ii) the 180 days immediately preceding the test that found the Metering Device to be defective or inaccurate.

(C) To the extent that the adjustment period covers a period of deliveries for which payment has already been made by PSCo, PSCo shall use the corrected measurements as determined in accordance with this Article to recompute the amount due for the period of the inaccuracy and shall subtract the previous payments by PSCo for this period from such recomputed amount. If the difference is a positive number, the difference shall be paid by PSCo to Seller; if the difference is a negative number, that difference shall be paid by Seller to PSCo, or at the discretion of PSCo may take the form of an offset to payments due Seller by PSCo. Payment of such difference by the owing Party shall be made not later than thirty (30) days after the owing Party receives notice of the amount due, unless PSCo elects payment via an offset.

5.11 Reliability Standards. Seller shall operate the Facility in a manner that complies with all national and regional reliability standards, including standards set by WSCC, NERC, the Federal Energy Regulatory Commission, and the CPUC, or any successor agencies setting reliability standards for the operation of generation facilities.

Article 6 - Obligation to Sell and Purchase Contract Capacity and Energy

6.1 Sale and Purchase. Beginning on the Commercial Operation Date, Seller shall supply from the Facility and sell to PSCo, and PSCo shall receive and purchase, the Contract Capacity and Contract Energy, as specified in Article 7 of this Agreement. Seller shall deliver the Contract Capacity and Contract Energy to, and make such power and energy available for sale to PSCo at, the Point(s) of Delivery set forth in Exhibit D to this Agreement. To the extent the Facility is available to operate, all of its power and energy output shall be made available for delivery to the Point(s) of Delivery and purchase by PSCo under this Agreement. Seller shall not curtail or interrupt deliveries of Contract Capacity and/or Contract Energy for economic reasons. Seller is not obligated to supply, and PSCo is not obligated to purchase, any energy that can be made available from the Facility in any one hour that is in excess of the Net Capability.

6.2 Transmission Arrangements. Seller shall be responsible for arranging, acquiring, and paying for any firm transmission services, and the associated

ancillary services, required to deliver the Contract Capacity and Contract Energy from the Facility to the Point(s) of Delivery. Line losses between the Facility and the Point(s) of Delivery are the responsibility of the Seller.

6.3 Conditions Precedent. Notwithstanding any provisions of this Agreement to the contrary, and without limiting any obligations of Seller under this Agreement, PSCo's obligation to purchase the Contract Capacity and Contract Energy from Seller is contingent upon the following:

(A) Seller shall have achieved all Construction Milestones and met all requirements set forth in Article 4 of this Agreement;

(B) Seller shall have obtained all permits, licenses, and approvals required by law to construct and operate the Facility;

(C) Seller shall have made all arrangements and executed all agreements required to deliver the Contract Capacity and Contract Energy to the Point(s) of Delivery; and

(D) PSCo shall have obtained all permits and approvals to purchase power from Seller that PSCo deems necessary to meet all requirements of law.

6.4 House Power and Maintenance Power. This Agreement does not provide for the supply of any electric service by PSCo to Seller or to the Facility. If Seller's Facility is located within PSCo's retail service territory, PSCo will provide house power and maintenance power to the Facility in accordance with PSCo's applicable electric tariffs.

Article 7 - Contract Capacity and Energy

7.1 Contract Capacity. The Contract Capacity provided and sold by the Seller and purchased by PSCo at the Point(s) of Delivery shall be all of the net generating capacity available at any time from the Facility, not to exceed the Net Capability specified in Article 3. The Contract Capacity purchased by PSCo shall include any and all uncommitted, unloaded and unscheduled capacity from the Facility. All reserve capacity associated with the Facility shall be deemed to have been purchased by PSCo. PSCo's SCC operator shall have the sole right to determine the Facility's start-ups, shut-downs and generation loading levels.

7.2 Contract Energy. The Contract Energy provided and sold by the Seller and purchased and received by PSCo hereunder shall be all of the metered, net energy output of the Facility, adjusted for losses to the Point(s) of Delivery. PSCo shall have dispatch control of the Facility.

7.3 Specifications of Power and Energy Delivered. All Contract Capacity and Contract Energy delivered to PSCo hereunder shall be in the form of three-phase alternating current at a frequency of sixty (60) hertz and at the nominal voltage for each individual Point of Delivery, as specified in Exhibit D.

Article 8 - Price (or Payment) for Contract Capacity and Energy

8.1 Price for Contract Capacity. PSCo shall pay Seller a monthly Capacity Payment for Contract Capacity based on the following formula:

Monthly Capacity Payment equals:

NC x [1.0(CAF) + 0.05(DAF) + 0.05(VAF)] x CP

Where:

NC = Net Capability (as specified in Article 3)

CAF = Rolling Twelve-Month Average Capacity Availability Factor = [(AH - EDH + SMH) / PH]

Where:

AH = The hours during which the Facility is available for service in the monthly billing period and the previous eleven monthly billing periods, even at reduced output. This includes reserve shutdowns at PSCo's request.

EDH = The equivalent planned and unplanned derated hours, which are derived from:

(Planned derated hours + Unplanned derated hours) x (Average derated KW during the derated hours / Net Capability)

SMH = Scheduled Maintenance Hours that meet the requirements specified in Article 10.

PH = Period Hours, meaning the number of total hours in the monthly billing period and the previous eleven monthly billing periods.

DAF = Rolling Twelve-Month Average Dispatch Availability Factor, where the factor is based on the number of hours the Facility is on AGC control, as determined by PSCo, and the number of hours the Facility is on line adjusted for Ramp Rate Availability as calculated below:

DAF = [Hours on-control / Hours on-line] x RAF

RAF = Ramp Rate Availability Factor, where

RAF = 1.00, if the Facility's Ramp Rate, as tested by PSCo, is 5.0% of NC per minute or greater

= 0.75, if the Facility's Ramp Rate, as tested by PSCo, is less than 5.0% of NC per minute, but equal to or greater than 2.5% of NC per minute

= 0.50, if the Facility's Ramp Rate, as tested by PSCo, is less than 2.5% of NC per minute, but equal to or greater than 1.0% of NC per minute

= 0.00, if the Facility's Ramp Rate, as tested by PSCo, is less than 1.0% of NC per minute

VAF = Rolling Twelve-Month Average VAR/Voltage Support Availability Factor.

Where:

VAF = 1.0, if Facility operates, as directed by PSCo's SCC operator, at a power factor of 90% leading/lagging or greater at the Point(s) of Delivery.

= 0.5, if the power factor is less than 90% leading/lagging but greater than or equal to 95% leading/lagging, as directed by PSCo's SCC operator, at the Point(s) of Delivery.

= 0.0, if the power factor is less than 95% leading/lagging, as directed by PSCo's SCC operator, at the Point(s) of Delivery.

CP = The applicable capacity payment rate:

$_____ per kW-Month.

8.2 Price for Contract Energy.

[Bidders will be given the option of bidding the price for Contract Energy under two methods.

1) The first method is based on Seller assuming the responsibility of delivering the fuel to the Facility.

2) The second method assumes Seller will contract with PSCo and PSCo will assume the responsibility of contracting, purchasing and delivering the fuel to the Facility.

3) This model power supply agreement assumes a gas-fueled facility. If Contract Energy is supplied by a Facility using a different fuel, the Agreement would require changes to the language to reflect the specific fuel used by the Facility.]

PSCo shall pay Seller a monthly energy payment for Contract Energy as specified below and such payment shall be adjusted for the heat rate of the Facility as described in Article 8.3.

[OPTION A: SELLER SUPPLIES THE FUEL FOR FACILITY

The payment method as described below is based on Seller contracting for the delivery of fuel to the Facility.]

Monthly Energy Payment equals:

[(Tolling Fee) x (Contract Energy)] + [(Actual Fuel Delivered) x (Indexed Gas Price)]

+ [Fixed Fuel Charge]

Where:

Tolling Fee is $_____ /MWh.

[It is intended that a Seller recover variable operation and maintenance expenses including non-fuel start-up costs, variable operating expenses, variable maintenance expenses and other potential Seller costs through a Tolling Fee. PSCo is receptive to a indexed tolling fee that would incent Seller to have Contract Energy available at times of high market prices and high PSCo demand.]

Contract Energy shall have the meaning set forth in Article 7.2.

Actual Fuel Delivered shall mean the total fuel delivered to the Facility.

Indexed Gas Price shall mean _____.

[Indexed Gas Price to be selected by Bidder. Bidder may propose a percentage of a gas market index.]

Fixed Fuel Charges = $_____ per month

[Seller may propose a Fixed Fuel Charge to recover fixed charges not recovered by the [(Actual Fuel Delivered) x (Gas Price Index)] energy payment component.]

[OPTION B: PSCo PURCHASES FUEL FOR THE FACILITY

Under this payment method Seller and PSCo agree that PSCo will be responsible for contracting, purchasing and arranging for delivering the fuel required for the Facility. Such arrangements require PSCo to enter into fuel supply and transportation agreements. However, PSCo expects that Seller will identify and propose to PSCo, natural gas pipeline and transportation arrangements to serve the Facility.]

Monthly Energy Payment equals:

[(Tolling Fee) x (Contract Energy)]

Where:

Tolling Fee is $_____ /MWh.

[It is intended that Seller recover variable operation and maintenance expenses including non-fuel start-up costs, variable operating expenses, variable maintenance expenses and other potential Seller costs through a Tolling Fee. PSCo is receptive to a indexed tolling fee that would incent Seller to have Contract Energy available at times of high market prices and high PSCo demand.]

Contract Energy shall have the meaning set forth in Article 7.2.

8.3 Heat Rate Adjustment to Energy Payment.

The heat rate of the Facility is predicted to be as follows:

_____

_____

_____

_____

PSCo shall have the right to request and schedule a heat balance test not more often than once every year. Seller shall perform the heat balance test under PSCo's review. ***[Under Option A]*** If the actual average heat rate resulting from the test is greater than the average for the predicted heat rates set forth above, the

Actual Fuel Delivered shall be multiplied by the factor equal to (Predicted Average Heat Rate / Actual Average Heat Rate) for the purpose of determining the Monthly Energy Payment until another heat balance test is performed. ***[Under Option B]*** If the actual average heat rate resulting from the test is greater than the average for the predicted heat rates set forth above, the Monthly Energy Payment to Seller shall be reduced by an amount which is equal to PSCo's cost of actual fuel delivered to the Facility, including transportation, multiplied by the factor equal to [1 - (Predicted Average Heat Rate / Actual Average Heat Rate)] until another heat balance test is performed. The heat balance test procedure shall be prepared by Seller and submitted to PSCo for review and approval thirty (30) days prior to such heat balance test.

Article 9 - Billing and Payment

9.1 Billing Statement and Invoices. The monthly billing period shall be the calendar month. No later than fifteen (15) calendar days after the end of each calendar month, PSCo shall prepare, and provide to Seller, a statement showing purchases by PSCo from Seller and associated payments, and an invoice for any charges to Seller, including any damages or other payments due from Seller to PSCo under the terms of this Agreement, for the previous calendar month billing period. The statement will show metered energy from the Facility and any loss adjustments to derive the Contract Energy used to establish the monthly Energy Payments to Seller. The statement will also show all factors used to establish the monthly Capacity Payments to Seller and any other data reasonably pertinent to the calculation of monthly payments due to either Seller or PSCo. Seller shall then provide to PSCo an invoice for the amount due Seller by PSCo.

9.2 Metered Billing Data. All billing data based on metered deliveries to PSCo shall be collected by the Metering Device(s) in accordance with Article 5 and adjusted for any applicable line losses to the Point(s) of Delivery.

9.3 Late Payments. Payments due Seller or PSCo, as the case may be, shall be due and payable by check, by Electronic Funds Transfer, or by wire transfer, as designated by the Owed Party, on or before the tenth (10th) business day following receipt of the billing invoice. Remittances received by mail will be considered to have been paid when due if the postmark indicates the payment was mailed on or before the tenth (10th) business day following receipt of the billing invoice. If the amount due is not paid on or before the due date, a late payment charge shall be applied to the unpaid balance and shall be added to the next billing statement. Such late payment charge shall be calculated based on an annual interest rate equal to one hundred twenty-five percent (125%) of the LIBOR three month rate published on the date of the invoice in *The Wall Street Journal* (or, if *The Wall Street Journal* is not published on that day, the next succeeding date of publication) (the "Reference Rate"). If the due date occurs on a weekend or holiday, the late payment charge shall begin to accrue on the next succeeding business day.

9.4 Billing Disputes. Both PSCo and Seller may contest invoiced amounts. PSCo at any time may offset against any and all amounts that may be due and owed to Seller under this Agreement, any and all amounts including all damages and other payments that PSCo has demonstrated are owed by Seller to PSCo pursuant to this Agreement or are past due under other accounts Seller has with PSCo for other services. In the event that any amount offset by PSCo against any amounts due and owing to Seller under this Agreement is later determined not to be owed by Seller to PSCo, PSCo shall then pay over such amount to Seller, with interest from the date of offset calculated at the same rate as that specified above for late payments. Uncontested and non-offset portions of invoiced amounts shall be paid on or before the due date or shall be subject to the late payment interest charges set forth above.

Article 10 - Operations and Maintenance

10.1 Maintenance Schedule.

(A) Seller shall provide a maintenance schedule for the Facility for the first year of operation at least 120 days prior to the Commercial Operation Date. Thereafter, Seller shall submit annual maintenance schedules by April 1 of each contract year for the 12-month period starting September 1 and ending August 31. At the same time, Seller shall also supply a long-term maintenance schedule that will encompass the following four maintenance years (September 1 through August 31). Seller shall furnish PSCo with reasonable advance notice of any change in the annual maintenance schedule. Reasonable advance notice of any change in the maintenance schedule is as follows:

Scheduled Outage Expected Duration	Advance Notice to PSCo
(1) Less than 2 days	at least 24 hours
(2) 2 to 5 days	at least 7 days
(3) Major overhauls (over 5 days)	at least 90 days

(B) Seller shall coordinate scheduled maintenance with PSCo. From time to time, PSCo shall provide Seller reasonable advance notice of significant plans, including major scheduled maintenance, with respect to its system that may materially affect the Facility.

(C) Seller shall not schedule any maintenance outages for the Facility during any weekday of an On-Peak Month without the prior written approval of PSCo.

(D) Seller shall be allowed a total of twenty-four (24) calendar days of Scheduled Maintenance Hours (SMH) per Contract Year to be used by Seller as a credit towards Seller's Capacity Availability Factor (CAF) provided that such SMH are scheduled in advance with PSCo pursuant to this Article and approved in writing by PSCo prior to Seller's use of such SMH. For purposes of this Article, Contract Year means any consecutive twelve (12) month period commencing with the Commercial Operation Date or the anniversary thereof.

10.2 Facility Operation. Seller shall staff, control, and operate the Facility consistent at all times with the Operating Procedures referenced below in this Article. Personnel capable of starting, running, and stopping the Facility shall be continuously available at the Facility and reachable by phone or pager.

10.3 Outage Reporting. Seller shall comply with all current PSCo and NERC generating unit outage reporting requirements, as they may be revised from time to time, as follows:

(A) When Forced Outages occur, Seller shall notify PSCo's SCC of the existence, nature, and expected duration of the Forced Outage as soon as practical, but in no event later than one (1) hour after the Forced Outage occurs. Seller shall immediately inform PSCo's SCC of changes in the expected duration of the Forced Outage unless relieved of this obligation by PSCo's SCC for the duration of each Forced Outage.

(B) Seller shall report to PSCo on a monthly basis all Scheduled Outage/Deratings that occurred during the preceding month within five (5) working days after the end of the preceding month. The data reported shall meet all requirements specified in the NERC Generation Availability Data System ("GADS") Manual. Data presentation shall be in accordance with the format prescribed in the GADS Manual, or any successor document.

10.4 Seasonal Net Dependable Capability. PSCo has certain planning, operating and reporting requirements that require the establishment of the seasonal net dependable capability for each Facility. Seller represents its best projection of the Facility's summer net dependable capability to be _____ MW and winter net dependable capability to be _____ MW. To determine the seasonal net dependable capability of the Facility, Seller shall cause the summer and winter Seasonal Capacity Test to be performed in accordance with the procedures identified in PSCo's Seasonal Capacity Test Requirements for Small Power Producers and Cogenerators, as such may be modified by PSCo from time to time. A current copy of the Seasonal Capacity Test Requirements is attached as Exhibit

F. As a one of the conditions for establishing the Commercial Operation Date, Seller shall cause the applicable initial summer or winter Seasonal Capacity Test to be performed prior to the Commercial Operation Date. Subsequent to the Commercial Operation Date and during the first year of the Term of this Agreement the other applicable summer or winter Seasonal Capacity Test shall be conducted. If, at the time of a scheduled Seasonal Capacity Test, the Facility is inoperable, as a result of Force Majeure or otherwise, so that no electricity can be produced, the attempt shall nevertheless constitute a test, and the test result shall, for reporting purposes, be 0 MW.

10.5 Operating Committee and Operating Procedures.

(A) PSCo and Seller shall each appoint one representative and one alternate representative to act in matters relating to the operation of the Facility and PSCo's system under this Agreement and to develop detailed operating arrangements for delivery of power from the Facility to PSCo. Such representatives shall constitute the Operating Committee. The Parties shall notify each other in writing of such appointments and any changes thereto. The Operating Committee shall have no authority to modify the terms or conditions of this Agreement.

(B) The Operating Committee shall develop mutually agreeable written Operating Procedures no later than ninety (90) days prior to the Commercial Operation Date. The Operating Procedures will be intended as a guide on how to integrate the Facility and its electrical output into PSCo's system and shall be consistent with the provisions of this Agreement. Operating Procedures shall include, but not be limited to, method of day-to-day communications; metering, telemetering, telecommunications, and data acquisition procedures; key personnel list for applicable PSCo and Seller operating centers; clearances and switching practices; operating and maintenance scheduling and reporting; daily capacity and energy reports; unit operations log; reactive power support; and such other matters as may be mutually agreed upon by the Parties.

Article 11 - Security for Performance

11.1 Security for Performance.

(A) Seller shall establish, fund, and maintain a Security Fund which shall be available at PSCo's discretion pursuant to Section 11.2 to pay any amount due PSCo pursuant to this Agreement, and to provide PSCo security that Seller will construct the Facility to meet the Construction Milestones and the Commercial Operation Date. The Security Fund shall also provide security to PSCo to cover replacement power costs should the Facility not operate in accordance with this Agreement. Seller agrees to establish, fund, and maintain a Security Fund at these levels:

(1) From March 1, 1999 until the Commercial Operation Date, Seller shall establish a security fund at a level of $75/kW of Contract Capacity.

(2) On the day after the Commercial Operation Date, the security fund may be reduced to a level of $25/kW of Contract Capacity for the remaining Term of this Agreement.

(B) The Security Fund shall be maintained at Seller's expense, shall be originated by or deposited in a financial institution or company ("Issuer") acceptable to PSCo, and shall be in the form of one or more of the following instruments, to be determined by mutual agreement of PSCo and Seller and specified in Exhibit I to this Agreement:

(1) An irrevocable standby letter of credit or a performance bond in form and substance acceptable to PSCo and consistent with this Agreement, including a provision for thirty (30) days advance notice to PSCo of any expiration of the security so as to allow PSCo sufficient time to exercise its rights under said security if Seller fails to extend or replace the security; or

(2) United States currency, deposited with Issuer, either: (i) in an account under which PSCo is designated as beneficiary with authority to draft from the account of the Issuer or otherwise access the security; or (ii) held by Issuer as trustee with instructions to pay claims made by PSCo pursuant to this Agreement, such instructions to be in a form satisfactory to PSCo. Security provided in this form shall include a requirement for immediate notice to PSCo from Issuer and Seller in the event that the sums held as security in the account or trust do not at any time meet the minimum security requirements as set forth in this Article 11. After Commercial Operation is achieved, annual account sweeps for recovery of interest earned by the Security Fund will be allowed if Seller is not in default; or

(3) In PSCo's sole discretion, a guarantee, in form and substance satisfactory to PSCo, from an entity with a bond rating of BBB+ or better as determined by at least two (2) rating agencies, one of which must be either Standard & Poor's or Moody's (or if either one or both are not available, ratings from alternate rating sources selected by PSCo). In addition, the entity providing such guarantee cannot be on credit watch or show a negative ratings trend.

(C) PSCo will reevaluate on an annual basis the value of all non-cash security posted by Seller. If the rating (as measured by either Standard & Poor's or Moody's, or if neither is available, a rating from an alternate rating source selected by PSCo) of the entity guaranteeing the security falls below BBB+ or if such entity is placed on credit watch by a rating agency, Seller shall be required to convert the security provided by the guarantee to an irrevocable standby letter of credit from an Issuer within thirty (30) days of such rating action.

(D) If security in the form of an irrevocable standby letter of credit is utilized by Seller to fund the Security Fund, the form of such letter must meet PSCo's requirements to ensure that claims or draw-downs can be made in accordance with the terms of this Agreement. Such security must be issued for a minimum term of one (1) year. The security must be renewed or extended for another one (1) year term no later than thirty (30) days prior to its expiration date. If Seller fails to renew such security as required under this section, PSCo shall have the right to draw immediately upon the security and to place the amounts so drawn in an escrow account in accordance with this Article until and unless Seller shall provide a substitute form of such security meeting the requirements of this Article.

(E) With respect to any escrow account opened as security for Seller's obligations hereunder, PSCo shall establish at Seller's cost and with Seller's funds an interest-bearing escrow account in the name of PSCo. Such escrow account may be drawn upon by PSCo to satisfy any unsatisfied obligations hereunder that it is intended to secure. If Seller's obligation to provide security hereunder expires, PSCo shall, within a reasonable period of time, return the balance in such escrow account to Seller. At such times as the balance in the escrow account exceeds the amount of Seller's obligation to provide security hereunder, PSCo shall remit, within a reasonable period of time, to Seller any excess in the escrow account above Seller's obligations. Seller may obtain the return of such escrow account at any time by providing to PSCo a substitute form of security in the same amount as the escrow account and meeting the appropriate criteria specified in this Article.

11.2 Damages.

(A) Delay Damages. If Seller fails to meet any Construction Milestone set forth on Exhibit B by the proposed Milestone Date, subject to extension for Force Majeure or delay attributable to PSCo under Article 14, Seller shall pay delay damages to PSCo or PSCo may withdraw funds from the Security Fund, as specified below:

Event	Delay Damages
Failure to meet the Construction Milestone set forth on Exhibit B, except for Commercial Operation Date	$5 per MW of Contract Capacity per day
Failure to achieve the Commercial Operation Date set forth on Exhibit B	$200 per MW of Contract Capacity per day during On-Peak Months
	$100 per MW of Contract Capacity per day during

months other than On-Peak Months

All damages shall begin accruing the day after the Construction Milestone Date or the Commercial Operation Date, as applicable, and shall continue until the specific milestone and/or Commercial Operation Date is achieved. All damages shall be cumulative, but shall not exceed the amount required to be contributed to the security fund pursuant to Section 11.1.

(B) Damages for Termination. In addition to other remedies available to PSCo under this Agreement and in law or equity for Seller's beach, if there is an Event of Default of Seller under Article 12, PSCo may immediately draw down the entire amount of the Security Fund as partial damages for Seller's breach.

(C) Other Damages. In addition to any other remedy available to it, PSCo may, at such times before or after termination of this Agreement, draw from the Security Fund appropriate amounts in order to recover such sums or amounts owing to it pursuant to this Agreement, including, without limitation, any damages due to PSCo pursuant to this Article. PSCo may, in its sole discretion, draw all or any part of the amounts due to it from any form or security to the extent available pursuant to this Article, and from all such forms, and in any sequence PSCo may select. Any failure to draw upon the security fund or other security for any damages or other amounts due to PSCo shall not prejudice PSCo's rights to recover such damages or amounts in any other manner provided under this Agreement. Without limiting the foregoing, at any time before or after termination of this Agreement, PSCo may send Seller a statement for such damages or other amounts as due to it at such time from Seller under this Agreement and such statement shall be payable in the manner and in accordance with the applicable provisions set forth in Article 9, including, without limitation, the provision for late payment charges, as if such statement were a monthly statement of PSCo to Seller in connection with purchases hereunder. At the completion of all of Seller's obligations under this Agreement, Seller shall be entitled to the Security Fund and accumulated interest if any funds are remaining in the Security Fund and no funds are owed to PSCo under this Agreement as of such time.

11.3 Additional Security.

(A) Prior to Commercial Operation, as security for the purpose of securing Seller's performance and any amounts owed by Seller to PSCo pursuant to this Agreement, Seller and/or PSCo, as the case may be, shall execute and record, as appropriate, separate agreements, documents, or instruments under which Seller will provide PSCo, in a form reasonably acceptable to PSCo and the Senior Lender, with fully perfected subordinated security interest(s), and/or mortgage lien (collectively the "Subordinated Mortgage") in the Facility and in any and all real and personal property rights, contractual rights, or other rights that Seller requires in

order to construct or operate the Facility. Such Subordinated Mortgage shall be subordinate in right of payment, priority, and remedies only to the interests of the Senior Lender for the Facility. The collateral security by the Subordinated Mortgage shall not include the pledge, assignment, or other interest in any stock or ownership interest in Seller; provided that Seller shall not pledge or assign, or cause or permit to be pledged or assigned, any stock or ownership interest in Seller as collateral to any party other than the Senior Lender.

(B) PSCo agrees to cooperate with Seller and diligently negotiate in good faith at Seller's request to agree on the form of these agreements and to execute and deliver such agreements as reasonably necessary to enable Seller to comply with the Construction Milestones. The Parties shall confirm, define, and perfect such Subordinate Mortgage by executing, filing, and recording, at the expense of Seller, the Subordinated Mortgage. In addition, Seller agrees to execute and file such UCC financing statements and to take such further action and execute such further instruments as shall reasonably be required by PSCo to confirm and continue the validity, priority, and perfection of the Subordinated Mortgage. The granting of the Subordinated Mortgage shall not be to the exclusion of, nor be construed to limit, the amount of any further claims, causes of action or other rights accruing to PSCo by reason of any breach or default by Seller under this Agreement or the termination of this Agreement prior to the expiration of its Term. The Subordinated Mortgage shall be discharged and released, and PSCo shall take any steps reasonably required by Seller to effect and record such discharge and release, upon the expiration of the Term of this Agreement, including any extension of the Term, and satisfaction by Seller of all obligations hereunder. Seller shall reimburse PSCo for its reasonable costs associated with the discharge and release of the Subordinated Mortgage and any other documents evidencing the Subordinated Mortgage.

(C) The Subordinated Mortgage shall provide that if PSCo acts to obtain title to the Facility pursuant to the interests provided by Seller pursuant to Section 11.3(A), Seller shall take all steps necessary to transfer all permits and licenses necessary to operate the Facility to PSCo, and shall diligently prosecute and cooperate in these transfers.

Article 12 - Default and Termination

12.1 Events of Default of Seller.

(A) The following shall constitute an Event of Default upon its occurrence and no cure period shall be applicable:

(1) Seller's dissolution or liquidation;

(2) Seller's assignment of this Agreement or any of its rights under it for the benefit of creditors;

(3) Seller's abandonment of construction and/or operation of the Facility; and

(4) Seller's filing of a petition in bankruptcy or insolvency or for reorganization or arrangement under the bankruptcy laws of the United States or under any insolvency act of any state, or Seller voluntarily taking advantage of any such law or act by answer or otherwise.

(B) The following shall constitute Events of Default of Seller upon their occurrence unless cured within thirty (30) days after the date of written notice from PSCo as provided for in Article 13.1:

(1) Seller's failure to meet the Commercial Operation Date or any of the Construction Milestones set forth on Exhibit B;

(2) Seller's failure to initiate and maintain funding of the Security Fund set forth in Article 11, to the levels, and upon the timing, specified;

(3) Seller's assignment of this Agreement or any of Seller's rights under this Agreement or the sale or transfer of voting control of Seller or Seller's sale or other transfer of its interest or any part thereof in the Facility without obtaining PSCo's prior written consent pursuant to Article 18;

(4) The filing of a case in bankruptcy or any proceeding under any other insolvency law against Seller as debtor or its parent or any other affiliate that could materially impact Seller's ability to perform its obligations hereunder; provided, however, that Seller does not obtain a stay or dismissal of the filing within the cure period;

(5) Seller's failure to make any payment required under this Agreement;

(6) Seller's attempt to tamper with PSCo's Interconnection Facilities;

(7) The sale by Seller to a third party, or diversion by Seller for any use, of Contract Capacity or Contract Energy committed to PSCo by Seller; or the diversion or sale by Seller of thermal energy necessary to produce the electrical energy committed to PSCo under this Agreement;

(8) Seller's failure to maintain a CAF greater than 60% on a 12-month rolling average basis;

(9) Any material misrepresentation by Seller;

(10) Seller's failure to maintain in effect any agreements required to deliver the Contract Capacity and Contract Energy to the Point(s) of Delivery; and

(11) Seller's failure to comply with any other obligation under this Agreement.

12.2 Lender Right to Cure Default of Seller. PSCo will accept a cure to a Seller default performed by the Senior Lender, so long as the cure is accomplished within the deadlines set forth in this Agreement, unless PSCo agrees in writing to provide the Senior Lender a longer cure period.

12.3 Events of Default of PSCo.

(A) The following shall constitute Events of Default of PSCo upon their occurrence and no cure period shall be applicable:

(1) PSCo's dissolution or liquidation, provided that division of PSCo into multiple entities shall not constitute dissolution or liquidation;

(2) PSCo's general assignment of this Agreement or any of its rights under it for the benefit of creditors; and

(3) PSCo's filing of a petition in bankruptcy or insolvency or for reorganization or arrangement under the bankruptcy laws of the United States or under any insolvency act of any State, or PSCo voluntarily taking advantage of any such law or act by answer or otherwise.

(B) The following shall constitute Events of Default of PSCo upon their occurrence unless cured within thirty (30) days after the date of written notice from Seller as provided for in Article 13.1:

(1) PSCo's failure to make any payment due hereunder (net of outstanding damages and any other rights of offset that PSCo may have pursuant to this Agreement);

(2) The filing of a case in bankruptcy or any proceeding under any other insolvency law against PSCo that could materially impact PSCo's ability to perform its obligations hereunder; provided, however, that PSCo does not obtain a stay or dismissal of the filing within the cure period; and

(3) PSCo's failure to comply with any other material obligation under this Agreement.

12.4 Termination. In addition to any other right or remedy available at law or in equity, either Party may, upon written notice to the other Party, terminate this Agreement if any one or more of the Events of Default for the other Party described in this Article occur and are not cured within the time periods set forth herein. Neither Party shall have the right to terminate this Agreement except as provided for upon the occurrence of an Event of Default as described above or as otherwise may be explicitly provided for in this Agreement. Nothing in this Agreement shall be construed to limit any right or remedy available at law or in equity to the Parties, including the right to any and all damages for any breach or other failure to perform hereunder. All remedies in this Agreement shall survive termination or cancellation of this Agreement and are cumulative.

12.5 Operation by PSCo Following Event of Default by Seller.

(A) In lieu of terminating this Agreement following an Event of Default by Seller, PSCo shall have the right, but not the obligation, to possess, assume control of, construct, develop, and operate the Facility and Seller's Interconnection Facilities as agent for the Seller (in accordance with Seller's rights, obligations, and interest under this Agreement) during the period provided for herein. Seller shall not grant any person, other than the Senior Lender for the Facility, a right to possess, assume control of, and operate the Facility that is equal to or superior to PSCo's right under this Section 12.5.

(B) PSCo shall give Seller and the Senior Lender ten (10) days notice in advance of the contemplated exercise of PSCo's rights under this Section. Upon such notice, Seller shall collect and have available at a convenient, central location at the Facility all documents, contracts, books, manuals, reports, and records required to construct, operate, and maintain the Facility and Seller's Interconnection Facilities in accordance with Good Utility Industry Practice. Upon such notice, PSCo, its employees, contractors, or designated third parties shall have the unrestricted right to enter the Facility and its site and Seller's Interconnection Facilities for the purpose of constructing and/or operating the Facility. Seller shall execute such documents and take such other action as may be necessary for PSCo to exercise its rights under this Article.

(C) PSCo shall be entitled to immediately draw upon the Security Fund to cover any expenses incurred by PSCo in exercising its rights under this section.

(D) During any period that PSCo is in possession of and constructing and operating the Facility pursuant to the foregoing paragraphs, PSCo shall use the proceeds from the sale of electricity generated by the Facility to (i) first, reimburse PSCo for any and all expenses reasonably incurred by PSCo (including a return on capital at PSCo's authorized return on equity most recently determined by the CPUC) in taking possession of, completing construction of, and operating the Facility, and (ii) second, any balance shall be remitted to the Seller.

(E) During any period that PSCo is in possession of and operating the Facility and Seller's Interconnection Facilities, Seller shall retain legal title to and ownership of the Facility and PSCo shall assume possession, operation, and control solely as agent for the Seller. In the event that PSCo is in possession and control of the Facility for an interim period, the Seller, the Senior Lender, or any nominee, transferee or successor thereof, may resume operation and PSCo shall relinquish its right to operate when the Seller, or the Senior Lender or any nominee, transferee or successor thereof, reasonably demonstrates to PSCo that it will remove those grounds that originally gave rise to PSCo's right to operate the Facility, as provided above, in that Seller, the Senior Lender, or any nominee, transferee, or successor thereof, (i) will resume operation of the Facility in accordance with the provisions of this Agreement, and (ii) have cured any Events of Default.

(F) PSCo's exercise of its rights hereunder to possess, construct, develop, and operate the Facility and Seller's Interconnection Facilities shall not be deemed an assumption by PSCo of any liability attributable to Seller.

12.6 Specific Performance. If Seller is in default, PSCo may elect to treat this Agreement as terminated and PSCo may recover such damages as may be proper, or PSCo may elect to treat this Agreement as being in full force and effect and PSCo shall have the right to specific performance or damages, or both.

Article 13 - Contract Administration and Notices

13.1 Notices in Writing. Notices required by this Agreement shall be addressed to each Party at the addresses noted in Exhibit G as they are updated by either Party from time to time by written notice to the other Party. Any notice, request, consent, or other communication required or authorized under this Agreement to be given by one Party to the other Party shall be in writing. It shall either be personally delivered or mailed, postage prepaid, to the representative of said other Party. In addition, the notice, request, consent, or other communication shall be sent by facsimile or other electronic means. Any such notice, request, consent, or other communication shall be deemed to be given when delivered or mailed. Routine communications concerning Facility operations shall be exempt from this Article .

13.2 Representative for Notice. Each Party shall maintain a designated representative to receive notices. Such representative may at the option of each Party be the same person as that Party's representative or alternate representative on the Operating Committee, or a different person. Either Party may, by written notice to the other, change the representative or the address to which such notices and communications are to be sent.

13.3 Authority of Representatives. The Parties' representatives designated above shall have authority to act for their respective principals in all technical matters relating to performance of this Agreement and to attempt to resolve disputes or potential disputes. However, they shall not have the authority to amend or modify any provision of this Agreement.

13.4 Operating Records. Seller and PSCo shall each keep complete and accurate records and all other data required by each of them for the purposes of proper administration of this Agreement, including such records as may be required by state or federal regulatory authorities and WSCC in the prescribed format.

13.5 Operating Log. Seller shall maintain an accurate and up-to-date operating log at the Facility with records of real and reactive power production for each clock hour; changes in operating status; Scheduled Outage/Deratings and Forced Outages; and any unusual conditions found during inspections. Seller must maintain accurate and up-to-date logs of scheduled and delivered Energy and other records needed in order to comply with this Agreement.

13.6 Billing and Payment Records. To facilitate payment and verification, Seller and PSCo shall keep all books and records necessary for billing and payments in accordance with the provisions of Article 9 and grant the other Party reasonable access to those records. All records of Seller pertaining to the operation of a Facility shall be maintained on the premises of the Facility.

13.7 Examination of Records. Seller and PSCo may examine the financial and Operating Records and data kept by the other relating to transactions under and administration of this Agreement at any time during the period the records are required to be maintained upon request and during normal business hours.

13.8 Dispute Resolution. The provisions of this section shall apply only after Seller has achieved the Commercial Operation Date. Prior to the achievement of the Commercial Operation Date, Seller waives any right that it has under this Agreement or in law or equity to dispute PSCo's right to step in to complete construction and to operate the Facility in accordance with Section 12.5.

After the Commercial Operation Date is achieved, the following dispute resolution provisions shall apply:

(A) Seller and PSCo shall give written notice to the other Party promptly following the occurrence or discovery of any item or event that might reasonably be expected to result in a dispute, in a request for changes in compensation or reimbursement, or any other matter in connection with this Agreement. The representatives of the Parties, as identified in this Article, will attempt to resolve the matters identified.

(B) If the two representatives are unable to negotiate a resolution to the dispute within sixty (60) days, either Party may give the other Party written notice that such negotiations are terminated and request that the dispute be settled through arbitration under the Commercial Arbitration Rules of the American Arbitration Association (AAA). Within thirty (30) days of such notice, the selection of a three-member panel of arbitrators shall be initiated as follows. Each Party shall select one arbitrator who has knowledge in the subject matter at issue, the qualifications of whom shall be entirely at the selecting Party's discretion, and shall notify the other Party in writing of such selection. Within twenty (20) days after such written notification of the selection of arbitrators, the two selected arbitrators shall choose a third arbitrator (the "neutral arbitrator"). If the two selected arbitrators cannot agree on a neutral arbitrator, they shall select the neutral arbitrator from a list of arbitrators experienced and knowledgeable in the subject matter at issue, to be submitted by the AAA. If the two selected arbitrators still cannot agree on a neutral arbitrator, the arbitrator shall be selected pursuant to Rule 13 of the AAA rules. Either Party may request the AAA to disqualify the neutral arbitrator on grounds of bias, personal or financial interest, or relationship with any Party, pursuant to the rules of the AAA. The panel of arbitrators shall convene a hearing within ninety (90) days of the selection of the neutral arbitrator and shall render a decision, by a majority of the panel, within thirty (30) days of such hearing. The decision shall be final and binding on the Parties and their successors and may be entered as a judgment in any court of competent jurisdiction. The decision shall be in writing, shall state the reasoning on which the award rests, and shall specify how the expenses of the arbitration shall be divided between the Parties. The panel of arbitrators may direct specific performance and may award other equitable relief, but it is not empowered to award punitive damages, treble damages, or other damages in excess of actual damages. The arbitrators shall not have the power to amend or add to this Agreement. The Parties agree that they hereby waive the right to recover damages in excess of actual damages and agree that they will not seek damages in any other forum.

Article 14 - Force Majeure

14.1 Definition of Force Majeure. The term Force Majeure, as used in this Agreement, means causes or events beyond the reasonable control of, and without the fault or negligence of the party claiming Force Majeure, including, without limitation, acts of God, sudden actions of the elements such as floods, earthquakes, hurricanes, or tornadoes; sabotage; vandalism beyond that which could reasonably be prevented by Seller; terrorism; war; riots; fire; explosion; severe cold or hot weather or snow or other extreme or severe weather conditions; blockage; insurrection; strike; slow down or labor disruptions (even if such difficulties could be resolved by conceding to the demands of a labor group); and actions by federal, state, municipal, or any other government or agency (including the adoption or change in any rule or regulation or environmental constraints lawfully imposed by

federal, state, or local government bodies) but only if such requirements, actions, or failures to act prevent or delay performance; and inability, despite due diligence, to obtain required licenses, permits, or approvals. The term Force Majeure does not include any full or partial curtailment in the electric output of the Facility that is caused by or arises from the act or acts of any third party, including, without limitation, any vendor, materialman, customer, or supplier of Seller, unless such act or acts is itself excused by reason of Force Majeure. The term Force Majeure does not include any full or partial curtailment in the electric output of the Facility that is caused by or arises from the curtailment of interruptible natural gas transportation service to the Facility. The term Force Majeure does not include any full or partial curtailment in the electric output of the Facility that is caused by or arises from a mechanical or equipment breakdown, or fires, explosions, or other mishap or events or conditions attributable to normal wear and tear or flaws, unless such mishap is caused by catastrophic equipment failure; acts of God; sudden actions of the elements such as floods, hurricanes, or tornadoes; sabotage; terrorism; war; riots; and actions by federal, state, municipal, or any other government or agency. The term Force Majeure does not include changes in market conditions that affect the cost of Seller's supply of fuel or alternative supplies of fuel, that affect demand or price for any of Seller's products, or that affect any of Seller's transmission service arrangements or the cost thereof, or impact upon the ability of any transmission provider to provide any transmission service necessary to deliver power from the Facility to the Point(s) of Delivery.

14.2 Applicability of Force Majeure. Neither Party shall be responsible or liable for any delay or failure in its performance under this Agreement due solely to conditions or events of Force Majeure, provided that:

(A) the non-performing Party gives the other Party prompt written notice describing the particulars of the occurrence of the Force Majeure;

(B) the suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure;

(C) the non-performing Party proceeds with reasonable diligence to remedy its inability to perform and provides weekly progress reports to the other Party describing actions taken to end the Force Majeure; and,

(D) when the non-performing Party is able to resume performance of its obligations under this Agreement, that Party shall give the other Party written notice to that effect.

14.3 Limitations on Effect of Force Majeure. In no event will any delay or failure of performance caused by any conditions or events of Force Majeure extend this Agreement beyond its stated Term. In the event of any delay or failure of performance caused by conditions or events of Force Majeure, which would

otherwise constitute an Event of Default pursuant to Article 12, the cure provisions of Article 12 shall not apply and such delay or failure of performance, if not previously cured, shall become an Event of Default on that date which is one (1) year from the date of notice provided for in Article 12. The other Party may, at any time following the end of such one-year period, terminate this Agreement upon written notice to the affected Party, without further obligation by the terminating Party except as to costs and balances incurred prior to the effective date of such termination. The other Party may, but shall not be obligated to, extend such one year period, for such additional time as it at its sole discretion deems appropriate, if the affected Party is exercising due diligence in its efforts to cure the conditions or events of Force Majeure.

14.4 Delays Attributable to PSCo. Seller shall be excused from delays in meeting performance deadlines under this Agreement, on a day-for-day basis, for any of the following delays attributable to PSCo:

(A) Delays in PSCo obtaining any required permits, consents, or approvals from governmental authorities or third parties required for PSCo to perform its obligations under this Agreement;

(B) Delay by PSCo in construction of its interconnection facility; and

(C) If PSCo is providing fuel for the Facility, any delay or failure to provide such fuel.

Article 15 - Representations and Warranties

15.1 Seller's Representations and Warranties. Seller hereby represents and warrants as follows:

(A) Seller is a _____ duly organized, validly existing and in good standing under the laws of the State of _____ and is qualified in each other jurisdiction where the failure to so qualify would have a material adverse effect upon the business or financial condition of Seller; and Seller has all requisite power and authority to conduct its business, to own its properties, and to execute, deliver, and perform its obligations under this Agreement.

(B) The execution, delivery, and performance of its obligations under this Agreement by Seller have been duly authorized by all necessary corporate action, and do not and will not:

(i) require any consent or approval of Seller's Board of Directors, or shareholders, other than that which has been obtained and is in full force and effect (evidence of which shall be delivered to PSCo upon its request);

(ii) violate any provision of law, rule, regulation, order, writ, judgment, injunction, decree, determination, or award currently in effect having applicability to Seller or violate any provision in any corporate documents of Seller, the violation of which could have a material adverse effect on the ability of Seller to perform its obligations under this Agreement; or

(iii) result in a breach or constitute a default under Seller's corporate charter or bylaws, or under any agreement relating to the management or affairs of Seller or any indenture or loan or credit agreement, or any other agreement, lease, or instrument to which Seller is a party or by which Seller or its properties or assets may be bound or affected, the breach or default of which could reasonably be expected to have a material adverse effect on the ability of Seller to perform its obligations under this Agreement;

(iv) result in, or require the creation or imposition of any mortgage, deed of trust, pledge, lien, security interest, or other charge or encumbrance of any nature (other than as may be contemplated by this Agreement) upon or with respect to any of the assets or properties of Seller now owned or hereafter acquired, the creation or imposition of which could reasonably be expected to have a material adverse effect on the ability of Seller to perform its obligation under this Agreement.

(C) This Agreement is a valid and binding obligation of Seller.

(D) The execution and performance of this Agreement will not conflict with or constitute a breach or default under any contract or agreement of any kind to which Seller is a party or any judgment, order, statute, or regulation that is applicable to Seller or the Facility.

(E) To the best knowledge, all approvals, authorizations, consents, or other action required by any governmental authority to authorize Seller's execution, delivery, and performance under his Agreement have been duly obtained and are in full force and effect, except for such approvals to be obtained as set forth in Exhibit J.

(F) Seller shall comply with all applicable local, state, and federal laws, regulations, and ordinances, including but not limited to equal opportunity and affirmative action requirements and all applicable federal, state, and local environmental laws and regulations presently in effect or which may be enacted during the term of this Agreement.

(G) Seller shall disclose to PSCo, to the extent that and as soon as it is known to Seller, any alleged violation of any environmental laws or regulations arising out of the construction or operation of the Facility, or the alleged presence of Environmental Contamination at the Facility or on the site, or the existence of any

past or present enforcement, legal, or regulatory action or proceeding relating to such alleged violation or alleged presence of Environmental Contamination.

(H) Upon the request of Public Service and at not cost to Public Service, Seller shall cause its counsel to issue an opinion to Public Service affirming the representations and warranties set forth in this Article.

(I) Seller agrees that, upon request of PSCo and at no cost to PSCo, Seller shall deliver or cause to be delivered to PSCo certifications of its officers, accountants, engineers, or agents as to such matters as PSCo may reasonably request.

(J) Seller agrees that a clause relating to the "Utilization of Small and Small Disadvantaged Business Concerns" set out in 48 CFR 52.219.8, 15 U.S.C. Section 637(d)(3), and any subsequent amendments, are, to the extent they may be applicable to this Agreement, incorporated by reference and made a part of this Agreement as if set forth fully herein.

(K) Seller shall, unless exempted by rules, regulations, or orders of the U.S. Secretary of Labor, comply during its performance of this Agreement with (i) the provisions of Executive Order 11246 of September 24, 1965 (the "Order"), and with the rules, regulations, and relevant orders of the U.S. Secretary of Labor issued pursuant to the Order; and (ii) Section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974 (the "Act") and any subsequent amendments to the Act, and with the rules, regulations, and relevant orders of the U.S. Secretary of Labor issued pursuant to the Act; and (iii) Section 503 of the Rehabilitation Act of 1973 (the "Rehabilitation Act"), and any subsequent amendments thereto and the rules, regulations, and relevant orders of the U.S. Secretary of Labor issued pursuant thereto; all of which, unless such exemption applies, are, pursuant to the authority of the aforementioned Order and Acts, made a part hereof to the extent of their applicability.

15.2 PSCo's Representations and Warranties. PSCo hereby represents and warrants the following:

(A) PSCo is a corporation duly organized, validly existing and in good standing under the laws of the State of Colorado and is qualified in each other jurisdiction where the failure to so qualify would have a material adverse effect upon the business or financial condition of PSCo; and PSCo has all requisite power and authority to conduct its business, to own its properties, and to execute, deliver, and perform its obligations under this Agreement.

(B) The execution, delivery, and performance of its obligations under this Agreement by PSCo have been duly authorized by all necessary corporate action, and do not and will not:

(i) require any consent or approval of PSCo's Board of Directors, or shareholders, other than that which has been obtained and is in full force and effect (evidence of which shall be delivered to Seller upon its request);

(ii) violate any provision of law, rule, regulation, order, writ, judgment, injunction, decree, determination, or award currently in effect having applicability to PSCo or violate any provision in any corporate documents of PSCo, the violation of which could have a material adverse effect on the ability of PSCo to perform its obligations under this Agreement; or

(iii) result in a breach or constitute a default under PSCo's corporate charter or bylaws, or under any agreement relating to the management or affairs of PSCo or any indenture or loan or credit agreement, or any other agreement, lease, or instrument to which PSCo is a party or by which PSCo or its properties or assets may be bound or affected, the breach or default of which could reasonably be expected to have a material adverse effect on the ability of PSCo to perform its obligations under this Agreement;

(iv) result in, or require the creation or imposition of any mortgage, deed of trust, pledge, lien, security interest, or other charge or encumbrance of any nature (other than as may be contemplated by this Agreement) upon or with respect to any of the assets or properties of PSCo now owned or hereafter acquired, the creation or imposition of which could reasonably be expected to have a material adverse effect on the ability of PSCo to perform its obligation under this Agreement.

(C) This Agreement is a valid and binding obligation of PSCo.

(D) The execution and performance of this Agreement will not conflict with or constitute a breach or default under any contract or agreement of any kind to which PSCo is a party or any judgment, order, statute, or regulation that is applicable to Seller or the Facility.

(E) To the best knowledge, all approvals, authorizations, consents, or other action required by any governmental authority to authorize PSCo's execution, delivery, and performance under his Agreement have been duly obtained and are in full force and effect.

(F) Upon the request of Seller and at no cost to Seller, PSCo shall cause its counsel to issue an opinion to Seller affirming the representations and warranties set forth in this Article.

Article 16 - Insurance and Indemnity

16.1 Evidence of Insurance. Seller shall annually provide PSCo with two copies of insurance certificates acceptable to PSCo evidencing the insurance coverages required to be maintained in accordance with Exhibit H to this Agreement. Such certificates shall (a) name PSCo as an additional insured (except worker's compensation); (b) provide that PSCo shall receive thirty (30) days prior written notice of non-renewal, cancellation of, or significant modification to any of the above policies (except that such notice shall be ten (10) days for non-payment of premiums); (c) provide a waiver of any rights of subrogation against PSCo, its affiliated entities and their officers, directors, agents, subcontractors, and employees; and (d) indicate that the Commercial General Liability policy has been endorsed as described above. All policies shall be written with insurers that PSCo, in its reasonable discretion, deems acceptable (such acceptance will not be unreasonably withheld), and the certificates shall be received not less than thirty (30) days after execution of this Agreement. All policies shall be written on an occurrence basis, except as provided in Section 16.2. All policies shall contain an endorsement that Seller's policy shall be primary in all instances regardless of like coverages, if any, carried by PSCo. Seller's liability under this Agreement is not limited to the amount of insurance coverage required herein.

16.2 Term and Modification of Insurance.

(A) All insurance required under this Agreement shall cover occurrences during the performance of services by Seller pursuant to the applicable agreement and for a period of two years after the term of such agreement. In the event that any insurance as required herein is available only on a "claims-made" basis, such insurance shall provide for a retroactive date not later than the date of this Agreement and such insurance shall be maintained by Seller, with a retroactive date not later than the retroactive date required above, for a minimum of five years after the Term of this Agreement.

(B) PSCo shall have the right, at times deemed appropriate to PSCo during the Term of this Agreement, to request Seller to modify the insurance minimum limits specified in Exhibit H in order to maintain reasonable coverage amounts.

(C) Upon a showing satisfactory to PSCo in its sole discretion that Seller has sufficient net worth to self insure, Seller may self insure either all or any portion of the foregoing coverages so long as there is no material decrease in said net worth, or means, that renders the same insufficient for purposes of self-insurance. If at any time during the Term of this Agreement PSCo, in its sole discretion, determines that it will no longer accept self insurance from Seller, PSCo shall provide notice to Seller and Seller shall obtain the insurance coverages required by Exhibit H within thirty (30) days.

16.3 Indemnification.

(A) Each Party (the "Indemnifying Party") agrees to indemnify and hold harmless the other Party (the "Indemnified Party") from and against all claims, demands, losses, liabilities, and expenses (including reasonable attorneys' fees) for personal injury or death to persons and damage to the Indemnified Party's property or facilities or the property of any other person or entity to the extent arising out of, resulting from, or caused by default of this Agreement or by the negligent or tortious acts, errors, or omissions of the Indemnifying Party, its corporate affiliates, its directors, officers, employees, or agents.

(B) Promptly after receipt by a Party of any claim or notice of the commencement of any action, administrative, or legal proceeding, or investigation as to which the indemnity provided for in this Article 16.3 may apply, the Indemnified Party shall notify the Indemnifying Party in writing of such fact. The Indemnifying Party shall assume the defense thereof with counsel designated by such Party and satisfactory to the Indemnified Party, provided, however, that if the defendants in any such action include both the Indemnified Party and the Indemnifying Party and the Indemnified Party shall have reasonably concluded that there may be legal defenses available to it which are different from or additional to, or inconsistent with, those available to the Indemnifying Party, the Indemnified Party shall have the right to select and be represented by separate counsel, at the Indemnifying Party's expense, unless a liability insurer is willing to pay such costs.

(C) If the Indemnifying Party fails to assume the defense of a claim meriting indemnification, the Indemnified Party may at the expense of the Indemnifying Party contest, settle, or pay such claim, provided that settlement or full payment of any such claim may be made only following consent of the Indemnifying Party or, absent such consent, written opinion of the Indemnified Party's counsel that such claim is meritorious or warrants settlement.

(D) Neither PSCo nor Seller shall be liable to the other or to any third party for any consequential, incidental, or indirect damages to persons or property, or loss of profits or revenues, loss of use, or loss of business opportunities, whether arising in tort, contract, or otherwise, by reason of this Agreement or any services provided hereunder. Notwithstanding the foregoing, if Seller breaches this Agreement, Seller shall be liable for the costs incurred by PSCo to obtain replacement power and energy after the Commercial Operation Date.

(E) Except as otherwise provided in this Article, in the event that a Party is obligated to indemnify and hold the other Party and its successors and assigns harmless under this Article 16.3, the amount owing to the Indemnified Party will be the amount of the Indemnified Party's actual loss net of any insurance proceeds

received by the Indemnified Party following a reasonable effort by the Indemnified Party to obtain such insurance proceeds.

Article 17- Regulatory Jurisdiction and Compliance

17.1 Governmental Jurisdiction and Regulatory Compliance. This Agreement shall at all times be subject to the authority of the Colorado Public Utilities Commission (CPUC), the FERC, or other Commissions, to the extent such Commissions have jurisdiction. Each party shall at all times comply with all applicable laws, ordinances, rules, and regulations applicable to it. As applicable, each party shall give all required notices, shall procure and maintain all necessary governmental permits, licenses, and inspections necessary for performance of this Agreement, and shall pay its respective charges and fees in connection therewith.

17.2 Provision of Support. Seller shall make available, upon PSCo's request, any personnel of Seller and any records relating to a Facility to the extent that PSCo requires the same in order to fulfill any regulatory reporting requirements, or to assist PSCo in litigation, including but not limited to rate proceedings before utility regulatory commissions.

Article 18 – Assignment and Other Transfer Restrictions

18.1 No Assignment Without Consent. Neither Party shall assign this Agreement, or any portion thereof, without the prior written consent of the other Party, which consent shall not be unreasonably withheld; provided, however, such consent shall not be required prior to an assignment by PSCo to a parent, subsidiary, or affiliated corporation or by Seller to the project lenders, or to a trustee or mortgagee pursuant to a financing agreement (in which case, however, such trustee or mortgagee shall agree that any further assignments by such trustee or mortgagee shall require the prior written consent of PSCo, which consent shall not be unreasonably withheld); but, provided further that in any event: (i) prior notice of any such assignment shall be provided to the other Party; (ii) any assignee shall expressly assume assignor's obligations hereunder, unless otherwise agreed to by the other Party, and no assignment, whether or not consented to, shall relieve the assignor of its obligations hereunder in the event the assignee fails to perform, unless the other Party agrees in writing in advance to waive assignor's continuing obligations pursuant to this Agreement; (iii) no such assignment shall impair any security given by Seller hereunder; and (iv) before such rights and obligations are assigned by Seller, the assignee must first obtain such approvals as are required by all applicable regulatory bodies including, but not limited to, the CPUC.

18.2 Accommodation of Senior Lender. To facilitate Seller's obtaining of financing to construct and operate the Facility, PSCo may enter into, at its sole discretion, an agreement with the Senior Lender to vary the terms and conditions of

this Agreement to protect the Senior Lender's interests. PSCo agrees to Seller's assignment of this Agreement to Senior Lender if required by the Financing Documents.

18.3 Restriction on Transfer of Ownership Interests in Seller. Any sale or other transfer of the ownership interests of Seller or any general partner of Seller that results in the transfer of a majority of the voting control of Seller shall require the prior written consent of PSCo, which shall not be unreasonably withheld.

18.4 Notice. Any financing agreement entered into by Seller shall provide that prior to or upon the exercise of trustee's or mortgagee's assignment rights pursuant to said agreement, trustee or mortgagee shall notify PSCo of the date and particulars of any such exercise of assignment rights.

18.5 Transfer Without Consent is Null and Void. Any sale, transfer, or assignment of any interest in the Facility or in this Agreement made without fulfilling the requirements of the Agreement shall be null and void and shall constitute an Event of Default pursuant to Article 12.

18.6 Restrictions on Subcontracting. Seller may not subcontract any of its duties or obligations under this Agreement without the prior written consent of PSCo, which shall not be unreasonably withheld, and, in any event, no such subcontract shall relieve Seller of any of its obligations thereunder.

Article 19 - Miscellaneous

19.1 Waiver. The failure of either Party to enforce or insist upon compliance with or strict performance of any of the terms or conditions of this Agreement, or to take advantage of any of its rights thereunder, shall not constitute a waiver or relinquishment of any such terms, conditions, or rights, but the same shall be and remain at all times in full force and effect.

19.2 Taxes. Seller shall be responsible for any and all present or future federal, state, municipal, or other lawful taxes applicable by reason of the ownership and operation of the Facility and the sale of energy under this Agreement and all ad valorem taxes relating to the Facility and the Interconnection Facilities.

19.3 Disclaimer of Third Party Beneficiary Rights. In executing this Agreement, PSCo does not, nor should it be construed to, extend its credit or financial support for the benefit of any third parties lending money to or having other transactions with Seller. Nothing in this Agreement shall be construed to create any duty to, or standard of care with reference to, or any liability to, any person not a party to this Agreement.

19.4 Relationship of the Parties.

(A) This Agreement shall not be interpreted to create an association, joint venture, or partnership between the Parties nor to impose any partnership obligation or liability upon either Party. Neither Party shall have any right, power, or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as an agent or representative of, the other Party.

(B) Seller shall be solely liable for the payment of all wages, taxes, and other costs related to the employment of persons to perform such services, including all federal, state, and local income, social security, payroll, and employment taxes and statutorily mandated workers' compensation coverage. None of the persons employed by Seller shall be considered employees of PSCo for any purpose; nor shall the Seller represent to any person that he or she is or shall become a PSCo employee.

19.5 Survival of Obligations. Cancellation, expiration, or earlier termination of this Agreement shall not relieve the Parties of obligations that by their nature should survive such cancellation, expiration, or termination, including without limitation warranties, remedies, or indemnities.

19.6 Severability. In the event any of the terms, covenants, or conditions of this Agreement, its Exhibits, or the application of any such terms, covenants, or conditions, shall be held invalid, illegal, or unenforceable by any court having jurisdiction, all other terms, covenants, and conditions of the Agreement and their application not adversely affected thereby shall remain in force and effect.

19.7 Complete Agreement; Amendments. The terms and provisions contained in this Agreement and referenced documents constitute the entire Agreement between PSCo and Seller and shall supersede all previous communications, representations, or agreements, either verbal or written, between PSCo and Seller with respect to the sale of electric capacity and energy from the Facility. This Agreement may be amended, changed, modified, or altered, provided that such amendment, change, modification, or alteration shall be in writing and signed by both Parties hereto.

19.8 Binding Effect. This Agreement, as it may be amended from time to time pursuant to this Article, shall be binding upon and inure to the benefit of the Parties' respective successors-in-interest, legal representatives, and assigns.

19.9 Headings. Captions and headings used in the Agreement are for ease of reference only and do not constitute a part of this Agreement.

19.10 Counterparts. This Agreement may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument.

19.11 Governing Law. The interpretation and performance of this Agreement and each of its provisions shall be governed and construed in accordance with the laws of the State of Colorado. The parties hereby submit to the jurisdiction of the state courts of the State of Colorado, and venue is hereby stipulated as Denver, Colorado.

IN WITNESS WHEREOF, the Parties have executed this Agreement.

[Seller's Name]

By: _____

_____
[Title]

[Seller's Address]

Public Service Company of Colorado

By: _____

_____
[Title]

Public Service Company of Colorado
1225 17th Street Plaza
Denver, CO 80202

EXHIBITS

Overview of an Electric Utility

Public Service Company of Colorado

Public Utility

- A business enterprise rendering a service considered essential to the public and, as such, subject to regulation in the public interest, usually by statutory law. (PUR Guide)

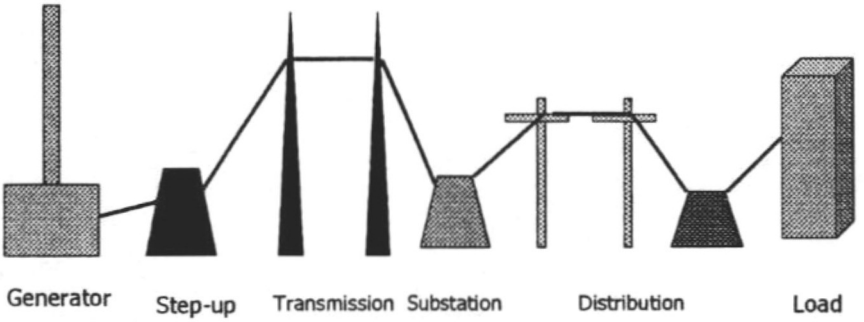
Regulation

- PSCo's retail transactions are regulated by the Colorado PUC.
- PSCo's wholesale transactions are regulated by the Federal Energy Regulatory Commission (FERC) and the Colorado PUC (principally through IRP).

Services Provided

- Electric Sales to Retail Customers
- Electric Sales and Purchases to and from Wholesale customers
  - In Colorado wholesale sellers can't sell to retail customers
  - Wholesale purchasers are limited (PSCo, TSGT, PRPA, CSU, WestPlains, Western Area Power Administration, small municipals)
  - PSCo is acquiring the most resources

How does an electrical system work?



What distinguishes the Electric Industry from many others

- Electricity is provided on DEMAND
  - Generation must equal Demand on a moment-to-moment basis
  - There is no significant energy storage
  - Demand varies continually -- both up and down -- as users turn on and off equipment
- Electrical Systems are interconnected

North American Electric Reliability Council

- November 9, 1965 - 30 million people in the dark
- Reviews past for lessons learned, develops policies, standards, principles, and guides
- Monitors compliance and assesses future reliability
- 10 regional councils in 3 interconnected areas

Within an interconnected system there are many control areas

- A **"control area"** is an electrical system bounded by interconnection (tie-line) metering and telemetry. It controls its generation directly to maintain its interchange schedule with other control areas.

There are 30 control area operators in WSCC

- Arizona Public Service
- Avista Corp.
- Bonneville Power Admin.
- BC Hydro
- California ISO
- Comision Federal de Elec.
- El Paso Electric
- ESBI Alberta
- Idaho Power
- Imperial Irrigation District
- Los Angeles DWP
- Montana Power Corp
- Nevada Power Corp
- PacifiCorp (East)
- PacifiCorp (West)
- Portland General
- Public Service of Colorado
- Public Service of NM
- PUD of Chelan County
- PUD of Douglas County
- PUD of Grant County
- Puget Sound Energy
- Salt River Project
- Seattle Dept of Lighting
- Sierra Pacific Power
- Tacoma Power
- Tucson Electric Power
- Western Area Power (CM)
- Western Area Power (LC)
- Western Area Power (UM)

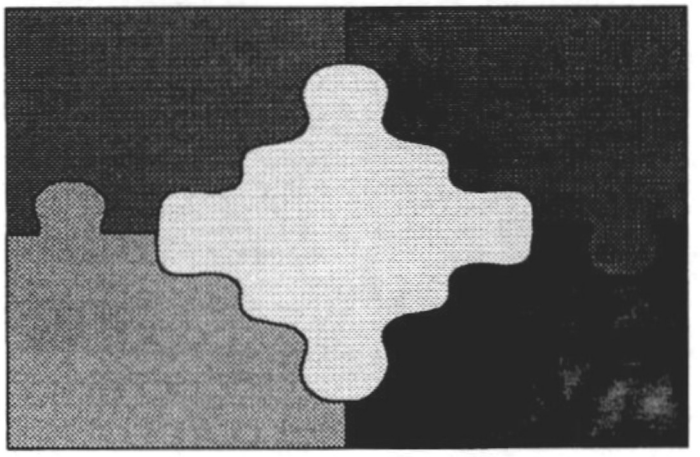
Colorado Control Area Operators

- Public Service Company of Colorado controls for:
  - Public Service Company of Colorado
  - Lamar Utilities Board
  - Platte River Power Authority
  - WestPlains Energy
- Western Area Power Administration (Colorado-Missouri Region) controls for:
  - Cheyenne Light, Fuel and Power
  - Colorado Springs Utilities
  - Tri-State Generation and Transmission
  - US Bureau of Reclamation

PSCo has many roles

- Control Area Operator
- Transmission Provider
- Generation Owner
- Power Purchaser
- Distribution Provider
- Electric Retail Provider
- Gas Retail Provider

These roles are currently in one company, so the PPA has to protect all of the impacted functions



PSCo's obligations:

- As Retail Provider, PSCo currently has an **obligation to serve** and is regulated by the Colorado Public Utilities Commission.
- PSCo's service territory load is growing; PSCo **must** acquire new resources through a competitive resource acquisition process

Integrated Resource Planning

- PSCo must file an IRP every three years to show our load and resource balance among other things
- If resources are needed, rules dictate the acquisition process
- PSCo also has resource needs between IRP cycles

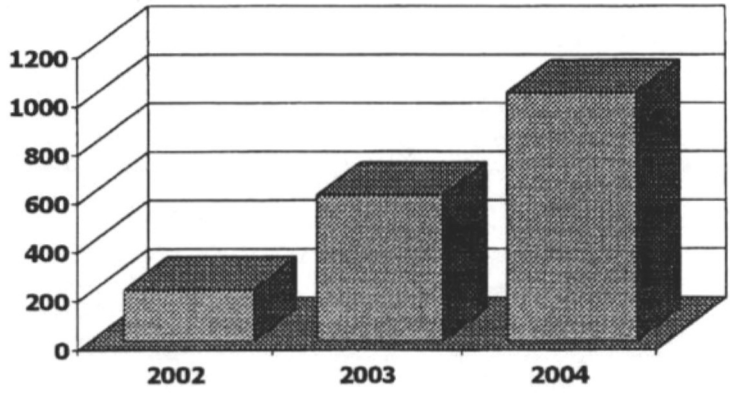
Will the area need more generation?

- **YES!!!**
  - With the Front Range delay, PSCo will need replacement power in 2000 and potentially in 2001
  - PSCo will start its 1999 IRP process November 15, 1999 and expects to need about 1,000 MW between 2002 and 2004.

Why does PSCo need resources?

- July 1998 Rolling Blackouts
  - New contracts with Tri-State, Black Hills, Basin, Brush 3, and Brush 4
- 1998 load growth impacted future forecasts, this year PSCo entered into four new contracts (4 - 7 years)
  - Black Hills
  - Brush 4
  - ManChief Station
  - Front Range Energy

PSCo resource needs



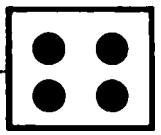
Why are new facilities necessary?

- PSCo is a minority transmission owner
- Other area utilities are not FERC regulated
- Transmission paths are near or over capacity
- Transmission permitting and construction lead-times are very long

Where will new facilities be located

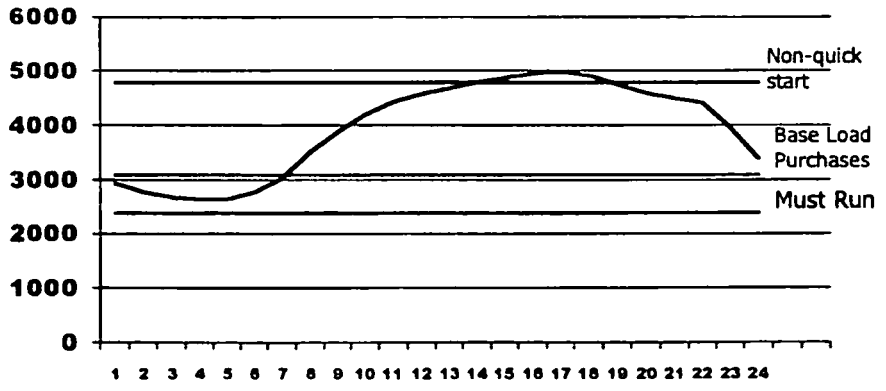
- Energy Parks or individual metro-area locations

To the transmission system



Multiple generators (and owners) on one common site

Resources need to match load



At this time, PSCo's system needs peaking/intermediate units to complement existing facilities and meet growing load

Our contracts should make the best use of the operating flexibility associated with these unit types

New Contracts

- Payments reflect the type of facility
- Payments tie directly to availability
- Direct fuel cost - tolling or reimbursement
- Fixed O&M, Variable O&M, Start-up payments, Stand-by payments

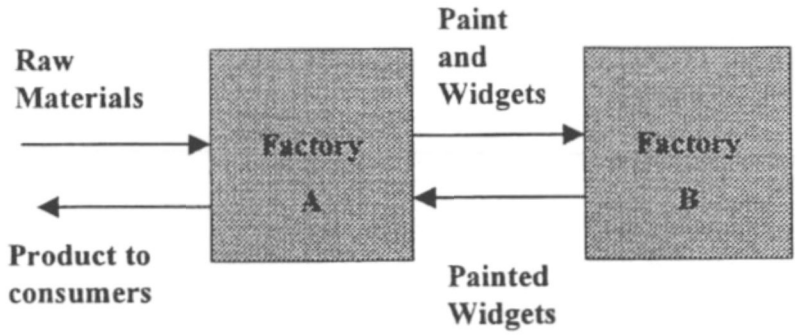
Since the resources are integral to meeting load, operation and maintenance coordination is encouraged

- Operating Committee
- Maintenance notification and incentive to coordinate
- Obligation to safely operate and maintain the facility remains with owner

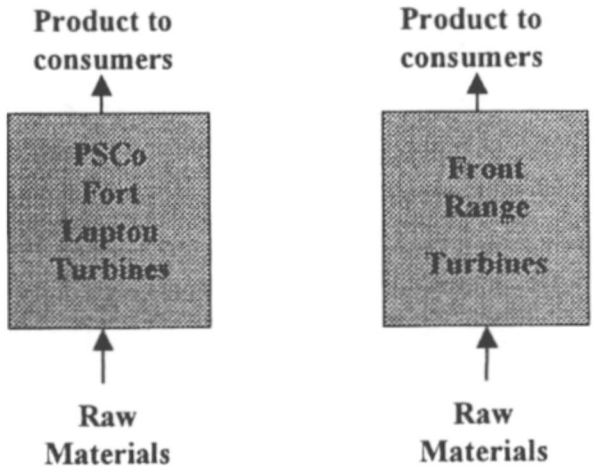
Many contract provisions benefit the control area operator/transmission provider

- Quick start helps control area operator recovery from unexpected loss of transmission or generation
- AGC helps the control area operator match generation to instantaneous load requirements -- "maintain interchange schedules with other control areas"
- System protection provisions protect the transmission system and the facility itself
- The interconnection guidelines and other exhibits gives the control area operator a vehicle to pass changing requirements to interconnected generators

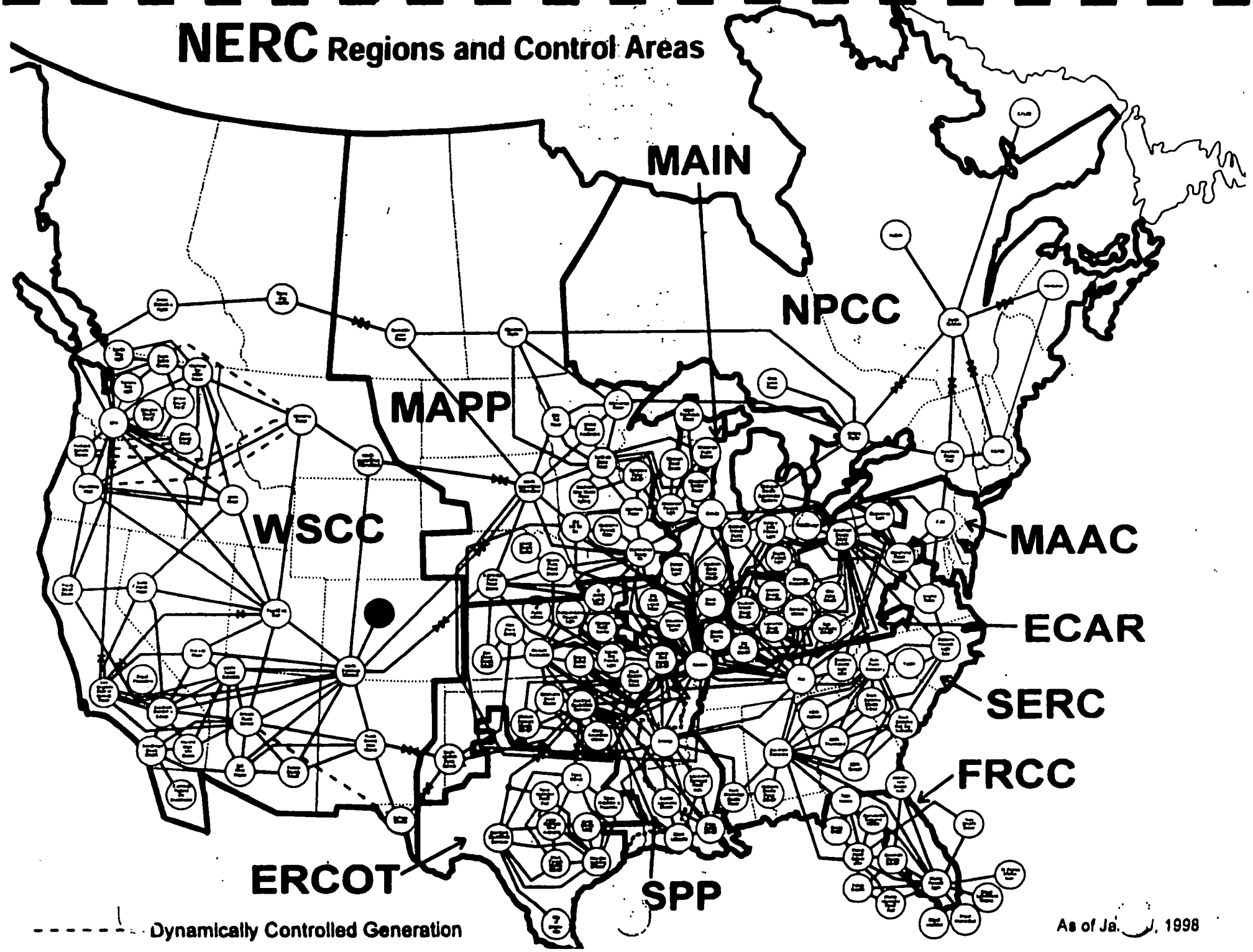
Is generation like painted widgets?

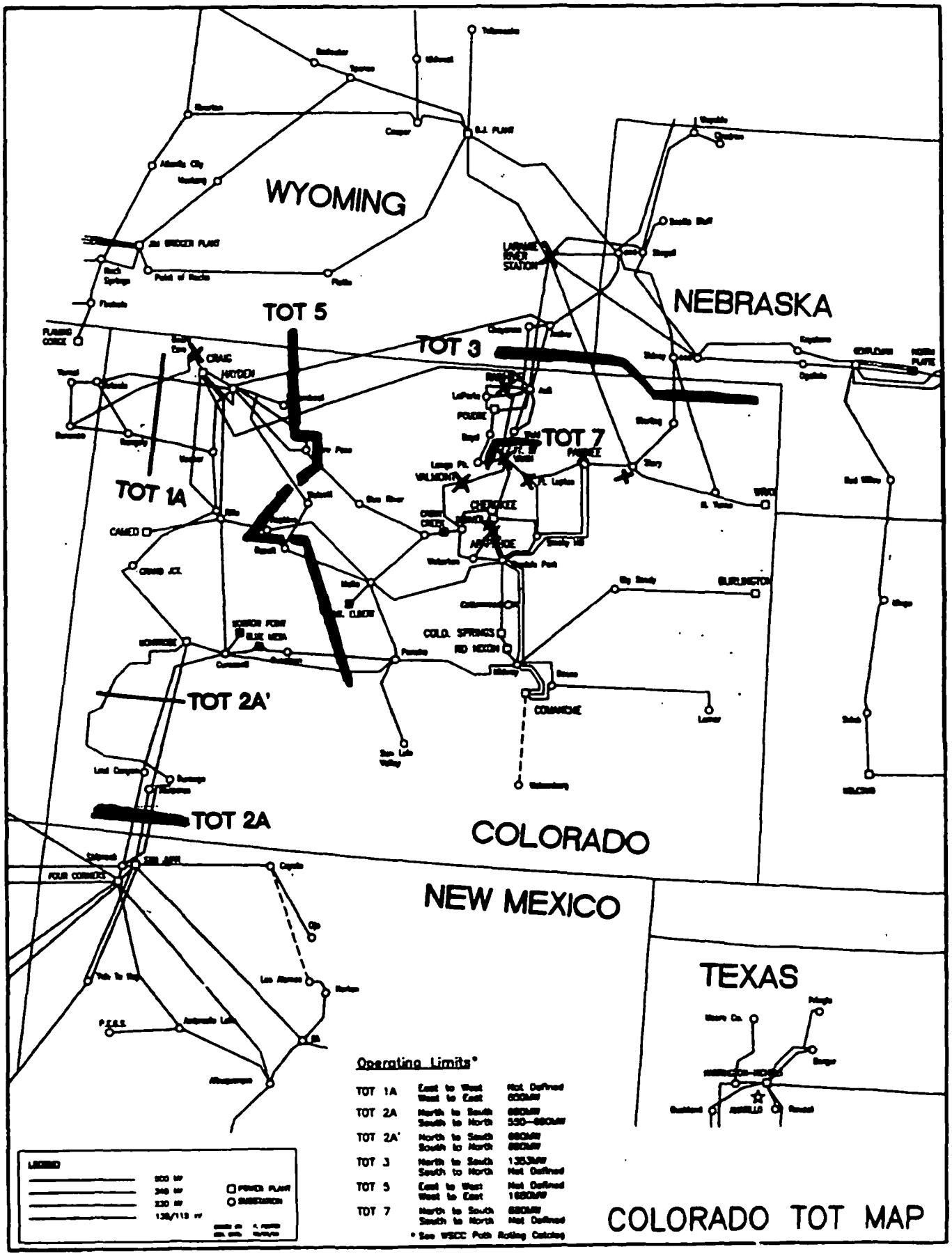


Is generation like painted widgets? No



Impact of the EPA Position


NERC Regions and Control Areas
MAIN
NPCC
MAPP
WSCC
MAAC
ECAR
SERC
FRCC
ERCOT
SPP
Dynamically Controlled Generation
As of Ja. .1998


WYOMING
NEBRASKA
COLORADO
NEW MEXICO
TEXAS
TOT 5
TOT 3
TOT 7
TOT 1A
TOT 2A'
TOT 2A
Operating Limits*
TOT 1A East to West Not Defined
West to East 600MW
TOT 2A North to South 680MW
South to North 530-680MW
TOT 2A' North to South 680MW
South to North 680MW
TOT 3 North to South 1353MW
South to North Not Defined
TOT 5 East to West Not Defined
West to East 1680MW
TOT 7 North to South 680MW
South to North Not Defined
* See WSCC Path Rating Catalog
COLORADO TOT MAP

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
999 18TH STREET - SUITE 500
DENVER, CO 80202-2466
http://www.epa.gov/region08

NOV 12 1999

Ref: 8P-AR

Frank Prager
Associate General Counsel
New Century Energies
1225 17th Street, Suite 600
Denver, CO 80202-5533

RE: October 1, 1999 Source Definition Interpretation for KNN Power/Front Range Energy Associates LLC/PSCo Project

Dear Frank:

I would like to thank you and the other representatives from New Century Energies and Public Service Company (PSCo) who met with us on November 8, 1999, for providing an overview of the electric utility industry. The meeting was very informative. I believe it is helpful for both the U.S. Environmental Protection Agency (EPA) and your company to keep open lines of communication as PSCo increases electrical generating capacity to meet its requirements under the Colorado Public Utilities Commission order.

We have reviewed your letter of October 26, 1999, seeking reconsideration of the conclusion we reached in our October 1 letter. In that letter, we interpreted the definition of "major stationary source" to encompass the proposed Front Range project in Fort Lupton, Colorado, as part of a single source with the existing adjacent PSCo power plant. While we appreciate PSCo's concerns about the implications of this interpretation for other power generation projects, we consider our interpretation to be the correct one. We believe that the proposed project meets the three criteria EPA uses to decide whether two facilities are separate sources or a single source for purposes of the prevention of significant deterioration (PSD) program: (1) the facilities belong to the same industrial grouping, (2) are located on adjacent properties, and (3) are under the control of the same person (or persons under common control).

Our analysis focused on the relationship between the proposed facility and PSCo as the managing entity of the existing Fort Lupton plant. We were not concerned, therefore, with finding a dependent relationship between the two facilities themselves. The issue of dependency is relevant, usually, when analyzing the relationship between a primary facility and a support facility that belong to different industrial groupings. This is not the case here, since PSCo's facility and the Front Range facility both would have been power plants and thus would have shared the same standard industrial classification (SIC) code.

At our meeting, you asked how EPA might view an "energy park," consisting of two or more power plants with different owners other than PSCo, all located on a common site and using a common access to the transmission system. Assuming that the contractual agreements between PSCo and the owners of those power plants would be similar to the power purchase agreement between PSCo and the owners of the Front Range project, it is possible that the plants would constitute a single source for purposes of PSD. This question is under review at an agency-wide level. We will inform you and the Colorado Department of Public Health and Environment (CDPHE) of EPA's interpretation as soon as our review is concluded.

Feel free to contact me, at 303-312-6004, or Terry Lukas in the Office of Regional Counsel, at 303-312-6898, if you have any further questions.

Sincerely,

Richard R. Long, Director
Air and Radiation Program

cc: Margie Perkins, Director, Air Pollution Control Division
Casey Shpall, Colorado Attorney General's Office

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
941 Chestnut Building
Philadelphia, Pennsylvania 19107

Ms. Westy McDermid
DC Advisory Neighborhood Council 2-E01
1631 34th Street, NW
Washington DC 20007

Dear Ms.McDermid:

This is in response to your letters concerning the proposed Georgetown Cogeneration Project. After a thorough review of the available information concerning the proposed permit, EPA Region III office does not have sufficient reason to reject the District's decision to permit the Georgetown Cogeneration Project as a minor source. The project was originally considered to be a major source, for which EPA would issue a prevention of significant deterioration (PSD) permit. Subsequently the projected emissions were revised so that the new emissions when compared with the emission reductions from the required shutdown of the fluidized bed boiler (FBB) result in net emissions increases which are not major and, therefore, not subject to PSD.

EPA has considered the issue of common control which you raised. We have reviewed the contract between Georgetown University and Dominion Energy, which requires Dominion Energy to operate the heating plant and furnish steam to Georgetown University. The contract is sufficient basis for considering the heating plant to be under common control. The replacement of the coal fired FBB boiler by an efficient combustion turbine plus duct burner will result in a net environmental benefit while providing additional electrical power. Region III is not troubled about enforceability issues regarding the shutdown of the coal-fired FBB boiler as required in the permit. If the FBB is not shut down, appropriate enforcement action will be taken against Dominion Energy as the operator of the facility.

We appreciate your concern and efforts at clarifying prospective emissions in the District of Columbia..

Sincerely,

Bernard E. Turlinski, Chief
Air Enforcement Branch

cc: Ferial Bishop (DCRA)
R. Usher (Dominion Energy)